79-527

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-

FRANK JAMES JOCK

and

HARRY ASHMAN

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The Petitioners, Frank James Jock and Harry Ashman, respectfully pray that a Writ of Certiorari be issued to review the Opinions and Orders of the United States District Court for the District of Delaware entered in this proceeding on September 8, 1978 and October 6, 1978, the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 14, 1979, and the Order Denying the Petition for Rehearing entered by that Court on August 8, 1979.

OPINIONS BELOW.

The Opinions of the District Court (A5-A40), the Judgment Order of the Court of Appeals (A41-A42) and the Order denying the Petition for Rehearing (A43), not yet reported, all appear in the Appendix hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 14, 1979. The Order denying the Petition for Rehearing was entered on August 8, 1979. An extension of time was granted by the Supreme Court until September 28, 1979 within which to file this Petition. This Petition was filed on or before that date. The Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Did not the trial court err in holding there was no constructive amendment of the indictment since, in fact, the proof of the essential elements of the wire fraud charge differed from the allegations in the grand jury indictment?

2. Did not the trial court err in holding no prejudicial variance between the indictment and the proof adduced at trial existed?

3. Did not the trial court err in holding there was sufficient evidence produced at trial regarding Count V to establish that an interstate telephone call was made and that this call was for the purpose of executing or in furtherance of the alleged scheme to defraud?

4. Did not the trial court err in holding Jock and Ashman did not meet the requirements necessary to order a new trial based on newly discovered evidence and the perjured testimony of the Government's principal witness at trial, Paul Scott?

STATUTE INVOLVED.

18 U. S. C. § 1341.

STATEMENT OF THE CASE.

This Writ arises from the judgment order of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court of the District of Delaware in favor of the Respondent and against the Petitioners (Docket No. 78-11), and from the subsequent Order entered Denying the Petition for Rehearing.

Petitioners were tried before the District Court and a jury upon an indictment charging a conspiracy to violate the provisions of the Racketeering Influenced and Corrupt Organizations Act (RICO) pursuant to 18 U. S. C. § 1962 (d) in Count I, Wire Fraud, in violation of 18 U. S. C. § 1343 in Counts II through VIII, Theft from Interstate Shipment, in violation of 18 U. S. C. § 659 in Counts IX and X, and RICO, 18 U. S. C. § 1961 in Count XI.

At the close of all the evidence, Petitioners moved for judgments of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. At that time, the District Court granted the motions of Petitioners for judgment of acquittal on Counts IX and X, the theft from interstate shipment charges. The District Court reserved decision on the motions regarding the remaining counts and submitted the case to the jury.

As to Jock, the jury returned verdicts of not guilty on Counts II, IV, VII and VIII, and verdicts of guilty on Counts I, III, V and XI. As to Ashman, the jury returned verdicts of not guilty on Counts II, III, IV, VII and VIII, and verdicts of guilty on Counts I, V, VI and IX. After the jury was discharged, both Petitioners renewed their motions for judgments of acquittal and/or new trial on the counts on which they were convicted. The District Court granted Jock's motion for judgment of acquittal on Counts I, III, VI and IX and also granted Ashman's motion for judgment of acquittal on Counts I, VI and XI. However,

since the District Court held there was sufficient evidence in the record upon which the convictions on Count V could be sustained, it upheld both Jock's and Ashman's convictions on Count V and denied their motions for judgments of acquittal. Both their motions for new trial on that count were also denied.

STATEMENT OF FACTS.

On April 6, 1977, Jock and Ashman were indicted. Count V of the Indictment charged them with wire fraud in violation of 18 U. S. C. § 1343. Specifically, Count V of the Indictment charged as follows:

> 1. The grand jury incorporates by reference and re-alleges the allegations contained in paragraph one (1) of Count II as if fully set forth herein and further charges.
>
> 2. On or about August 4, 1977, in the District of Delaware, FRANK JAMES JOCK, JR., HARRY ASHMAN, and PAUL SCOTT, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so did transmit and cause to be transmitted in interstate commerce by means of wire communication, that, is, a telephone communication between Delaware and New Jersey, certain signs, signals, and sound.
>
> All in violation of 18, United States Code, Section 1343.

The relevant portions of Count II charged:

> 1. From on or about July, 1977, through August, 1977, in the District of Delaware, the defendants FRANK JAMES JOCK, JR., HARRY ASHMAN, and PAUL SCOTT, and unindicted co-conspirator Randolph Dickerson, unlawfully, wilfully, and knowingly, did devise and intend to devise a scheme and artifice to defraud and for obtaining property, by means of the following false and fraudulent pretenses and representations, from Paradee Oil Company, and which scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations so devised by the said defendants, was in substance as follows:

a. It was part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that defendant FRANK JAMES JOCK, JR. for the purpose of obtaining fuel oil by false and fraudulent means would and did induce defendant PAUL SCOTT to steal, unlawfully take, and carry away fuel oil from an oil depot by offering to pay and paying through defendant HARRY ASHMAN compensation to defendant PAUL SCOTT;

b. It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that prior to each delivery of fuel oil to Forte Oil Company, defendant PAUL SCOTT would telephonically communicate in the state of Delaware with defendant HARRY ASHMAN in the state of New Jersey, for the purpose of arranging delivery of said fuel oil to Forte Oil Company;

c. It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that in connection with each delivery of fuel oil to Forte Oil Company, defendant PAUL SCOTT would and did obtain a purchase order from his employer, Paradee Oil Company, authorizing him to pick up a load of fuel to be received and paid for by Paradee Oil Company;

d. It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that defendant PAUL SCOTT, in connection with each delivery, would and did pick up a load of fuel oil and deliver it to Forte

Oil Company, in Atco, New Jersey rather than Paradee Oil Company;

e. It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that defendant HARRY ASHMAN, in connection with each delivery of fuel oil to Forte Oil Company, would and did pay compensation to defendant PAUL SCOTT;

f. It was further a part of the scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses and representations that defendant PAUL SCOTT, in connection with each delivery of fuel oil to Forte Oil Company, would and did submit purchase orders and bills of lading to his employer, Paradee Oil Company, for the fuel oil which had been delivered to Forte Oil Company, said documents causing Paradee Oil Company to pay for fuel oil which it had never received, and which in fact, had been fraudulently converted to the use of and delivered to Forte Oil Company.

The trial court ordered the Government to answer a Bill of Particulars which provided the following information concerning the scheme to defraud involved in Count V:

> ". . . on or about August 5, 1977, PAUL SCOTT left the Paradee Terminal in the evening, exact time unknown. Sometime during his shift, he travelled to Delaware City, Delaware to the Getty Oil Company where he picked up the fuel oil and before his shift ended, he delivered the fuel to Forte Oil Company. The fuel was purchased from BP Oil Co."

Accordingly, the scheme to defraud is that on August 4, 1977, Paul Scott, a government witness, placed calls from Delaware to Ashman in New Jersey to set up the theft of fuel oil from Getty Oil Company on August 5, 1977 to be delivered the same day to Forte Oil Company, in New Jersey, and which was owned by Jock.

Simply stated the defense is that the telephone calls by Scott to Ashman's residence were not received by Ashman because at the time of the telephone calls Ashman was in Brooklyn, New York over 100 miles away. Moreover, there was no theft of fuel oil from Getty Oil on August 5, 1977.

It may sound ludicrous, but Ashman and Jock, therefore, were convicted of wire fraud for telephone calls to Ashman which never happened to set up a theft of fuel oil which never occurred.

During the trial, Paul Scott stated that he lied when he testified there was a theft of fuel oil from Getty Oil Company on August 5, 1977. (N. T. 876-877).

Generally, the scheme to defraud allegedly involved Jock, Ashman and the government witness, Paul Scott, in a scheme to steal seven shipments of fuel oil (but actually gasoline) from Scott's employer, Paradee Oil Company, in Dover, Delaware, and deliver the said shipments of fuel oil to E. Forte Oil Company, owned and operated by Jock in Atco, New Jersey.

The indictment alleged seven specific deliveries pursuant to the scheme. Count V applies to wire fraud in support of a delivery allegedly occurring on or around August 5, 1977. The remaining counts were either dismissed or resulted in a verdict of not guilty.

Scott was employed by Paradee Oil Company as a driver of a tanker truck. His normal work period started at 2:00 a.m. and ended at 10:00 a.m. His duties included

picking up of fuel products, including fuel oil and gasoline, pursuant to a purchase order, and delivery of the shipment either back to Paradee or to one of its customers. Normally, Scott made two or three shipments each night.

Generally, with regard to all seven shipments of fuel oil, and specifically with regard to the shipment of fuel oil on August 5, 1977 involved in Count V, Scott testified that he would steal the fuel oil and always deliver it to Forte Oil Company at night between 1:00 a.m. and 4:00 a.m. Accordingly, Count V involved a delivery of fuel oil to Forte Oil Company at night between 1:00 a.m. and 4:00 a.m on August 5, 1977, as charged in the indictment.

With regard to Count V, the facts are that Scott placed two telephone calls at 2:02 p.m. and 2:04 p.m. (both were two minutes or less in duration) from his residence in Dover, Delaware to the residence of Ashman in Blackwood, New Jersey for the alleged purpose of furthering the scheme to steal fuel oil from Getty Oil on August 5, 1977. Apparently, someone other than Ashman, answered the phone because at the time of the telephone calls, Ashman was in Brooklyn, New York, over 100 miles away, and it would have been impossible for him to have answered the phone.

According to the evidence adduced at trial, prior to each theft of fuel, Scott would contact the dispatcher at Paradee during the late afternoon at about 5:00 p.m., or later, to determine which shipments he was scheduled to pick up during his shift later that evening. After contacting the dispatcher, he would then contact Ashman to advise him of the intended theft and delivery to Forte Oil to occur that evening, but actually the next morning, between 1:00 a.m. and 4:00 a.m.

Scott's Daily Dispatch dated August 5, 1977 disclosed that he was scheduled to make two pick ups and deliveries during his shift on August 5, 1977.

The first pick up was to be 8,000 gallons of gasoline from the Gulf Refining in Baltimore, Maryland and it was delivered to the Paradee Oil Company plant in Chestertown, Maryland. The second trip involved a pick up of 8,000 gallons of fuel oil from the Getty Refinery at Delaware City, Delaware (Count V) consigned to British Petroleum, and it was delieverd to Paradee Oil Company plant at Dover, Delaware. The aforementioned second trip is the gravamen of Count V in the indictment.

During the trial and two days after he completed his earlier testimony, Paul Scott appeared again before the jury and recanted most, if not all, of his prior testimony and openly admitted to lying during the two days of prior testimony.

During his second appearance, Scott specifically admitted that he did *not* steal 8,000 gallons of fuel oil from Getty Oil Company on August 5, 1977. (N. T. 876-7). Obviously, since it was not stolen, it was not delivered to Jock and Ashman at Forte Oil Company in New Jersey.

Paul Scott pleaded guilty prior to trial and testified as the government's key witness against Ashman and Jock. In order to appreciate the merits of the instant appeal it is necessary to examine the evolution of Scott's testimony.

In September, 1977, when first contacted by the F. B. I., Scott denied knowing Frank Jock. Shortly thereafter, on September 29, 1977, Scott admitted to the F. B. I. that he knew Jock and he had stolen one shipment of 8,000 gallons of stolen fuel from the Sico Plant in Wilmington and delivered it to Forte Oil Company. Both at the Grand Jury and the trial, Scott admitted that he had lied concerning this shipment.

On October 6, 1977, Scott made his first appearance before the Grand Jury and testified about the aforementioned theft from Sico Oil Company. Scott only admitted this one theft and denied any involvement with any other

thefts. Again, at the trial, Scott admitted he had lied to the Grand Jury during this appearance.

On November 3, 1977, Scott was interviewed by the F. B. I. and again advised them that there was only one theft of a fuel shipment from Sico Oil. During the trial, Scott again admitted he lied to the F. B. I.

On February 23, 1978, Scott was again interviewed by the F. B. I. During this interview Scott now recalled taking approximately seven loads of fuel oil or gasoline to Forte Oil Company in Berlin, New Jersey. The dates Scott recalled diverting oil were on July 22, July 28, July 30, *August 5,* August 10, August 12, and August 17, 1977, which dates are identical to those dates contained in the indictment. He also identified the purchase orders and invoices relating to the seven shipments which were stolen on the aforementioned dates.

On March 9, 1978, Scott was interviewed again by the F. B. I. During that interview, Scott contended that he diverted seven loads of fuel oil to Forte, the diversions occurring on the aforementioned dates.

Later that day, on March 9, Scott again testified before the Grand Jury. During his third, and again perjurous appearance, Scott stated with specificity how, when, and by what means each shipment of fuel was diverted. In each case, his testimony was precise and to the effect that certain fuel oil or gasoline was stolen on a specified date. Indeed, with regard to each alleged theft, Scott stated with particularity the time he picked up the contraband, place of pick up, place of delivery, and time of delivery. He buttressed each alleged delivery with an invoice, which the supplying company provided, as well as the Paradee purchase order authorizing such invoice. (A44-A46).

Jock and Ashman submit that the documents relied upon by Scott during his testimony were an inherent part of that testimony. Moreover, the documents were con-

sidered and weighed by the Grand Jury. When Scott subsequently disavowed the documents at trial, he in effect repudiated the cornerstone of his Grand Jury testimony. Scott's reliance upon the documents are evident upon an examination of the testimony leading to the indictment.

During his testimony before the grand jury involving the fourth shipment of August 5, 1977, Scott first identified the invoice as indicating a shipment from Twin Oaks, Pennsylvania, but Scott was reminded that the invoice indicated that the pick up was from Delaware City and not from Twin Oaks. This highlights Scott's reliance on the documents presented to him during his Grand Jury testimony.

Specifically, before the Grand Jury with regard to Count V involving the August 5, 1977 shipment, Scott testified while reviewing the purchase order and invoice, as follows:

> "Q. You picked up 8,000 gallons from Getty Oil in Delaware City and as per your telephone conversation with Whitey [Ashman], you drove to Berlin, New Jersey, Forte Oil Company?
>
> A. Yes." (A46).

This testimony, plus the supporting invoice and purchase order was the only evidence (A47-A48) presented to the Grand Jury involving Count V and, therefore, it was the factual basis of Count V of the Grand Jury indictment.

During the trial, Scott admitted that he lied to the Grand Jury concerning the theft of fuel oil from Getty Oil Company on August 5, 1977. (N. T. 876-877).

Prior to the start of the trial, pursuant to discovery under the Federal Rules of Criminal Procedure, Jock and Ashman were supplied with a Bill of Particulars as well as copies of G2 through G8, which were the exhibits the Government used during Scott's last Grand Jury testimony,

and those from which he based his testimony regarding the dates of the alleged diversions. The indictment and Bill of Particulars referred to seven specific dates, which dates correspond to the dates of the oil company invoices furnished Jock and Ashman through discovery. Moreover, the Bill of Particulars identified the place where the fuel oil was picked up which, in each instance, corresponded with the invoice supplied by the Government referring to that date. Clearly, the Government, through pretrial discovery and the indictment advised that seven specific shipments, denoted by Exhibits G2 through 8, were diverted at times and places therein alleged to E. Forte Oil. Jock and Ashman were advised of, with particularity, the date, origin, location and product of each alleged theft. From there, they set out to defend the charges relying on this pretrial discovery.

Relying upon this information, Jock and Ashman conducted an extensive pretrial investigation in which they reconstructed Scott's activities on the dates involved in the thefts disclosed in the indictment, Bill of Particulars, and the Government's exhibits. Documentation produced by the defense included Paul Scott's driver's logs, his bridge toll receipts, and sign in and sign out sheets from terminals visited by him during the alleged dates.

Through this meticulous reconstruction of Paul Scott's activities, Jock and Ashman were able to show that none of the deliveries occurred as alleged by Paul Scott during his direct examination and during his third Grand Jury testimony. However, when Scott testified during his second appearance at the trial, his testimony was to the effect that not all of the deliveries necessarily occurred at the time, date or place he had first testified. Rather, Scott testified that they did occur on or around that time period, but not specifically on August 5, 1977. Consequently, after Jock

and Ashman laboriously proved the seven alleged diversions could not have occurred they were thwarted when Scott, and the Government, neatly sidestepped the overwhelming defense presented and resorted to a vague and nebulous set of amended charges.

ARGUMENT.

A. The Trial Court Erred in Holding There Was No Constructive Amendment of the Indictment Since, in Fact, the Proof of the Essential Elements of the Wire Fraud Charge Differed From the Allegations in the Grand Jury Indictment.

Count V of the indictment charged Jock and Ashman with wire fraud involving telephone calls on August 4, 1977 in furtherance of a scheme to defraud which involved a diversion of fuel oil to Forte Oil Company on August 4, 1977. The Bill of Particulars identified the diversion of fuel as being a shipment of fuel oil from Getty Oil Company picked up on August 5, 1977 and delivered the same day to Forte Oil Company.

The basis of the indictment and the information furnished in the Bill of Particulars was the testimony of Paul Scott before the Grand Jury on March 9, 1978, when he testified that on August 5, 1977 he picked up 8,000 gallons of fuel oil from Getty Oil Company and delivered it to Forte Oil Company. During his Grand Jury testimony, Scott identified and relied on the purchase order (A47) from Paradee Oil Company and the invoice (A48) from Getty Oil Company with regard to the August 5, 1977 shipment. Scott even embellished on this by testifying that these were the documents because he wrote on them "deliver to Dover, new plant". These three pages of Scott's Grand Jury testimony are the entire basis for the return by the Grand Jury of Count V of the indictment and it is important to take special note of these pages. (A44-A46).

Nearly six weeks prior to trial, the Government as part of their evidence-in-chief furnished Jock and Ashman copies of the purchase order and invoice dated August 5, 1977. (A47-A48). Shortly before trial, the Government

furnished the March 9, 1977 Grand Jury testimony of Paul Scott where he identified these documents as the shipment diverted by him from Getty Oil Company to Forte Oil Company on August 5, 1977.

During the trial, Scott testified that he lied when he stated that there was a theft of 8,000 gallons of fuel oil from Getty Oil Company on August 5, 1977. (N. T. 876). Had Scott not supported his testimony with the documents, it is entirely possible no indictment would have been issued. At this point it is noteworthy to remember Paul Scott admittedly testified falsely to that Grand Jury on two prior occasions. Moreover, if Scott's testimony to the Grand Jury was to the effect that the specified documents may, or may not have denoted the diverted shipment, it is entirely possible the Grand Jury would not have had enough evidence on which to indict. Clearly, it is entirely speculative what the Grand Jury *would have done* had it known the documents testified to were false and did not correspond to the stolen shipments.

We do know, however, that the shipment of August 5, 1977 earmarked by invoice and purchase order (A47-A48) *did not* occur as alleged before the Grand Jury. (N. T. 876). Consequently, Jock and Ashman were convicted of crimes wholly outside any evidence presented to the Grand Jury or charged in the indictment.[1]

In *Stirone v. United States*, 361 U. S. 212, 217 (1960) the Supreme Court reaffirmed that a "Court cannot permit a defendant to be tried on charges that are not made in the indictment against him." The rational for the rule is clear:

1. Ironically, when Mr. Scott was about to change his testimony with regard to the seven alleged thefts, Mr. Kidd asked the court at side bar: "Are we trying another entirely new case? If we are, I think it should be referred to another day and another time and another courtroom. I would like to at least stay somewhat close to the indictment." (N. T. 805).

> "The very purpose of the requirement that a man be indicted by Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone, supra,* at 218.

Would this group of fellow citizens have thought enough of Scott's testimony unsupported by the discredited exhibits to indict? Who knows?

In *Stirone*, the defendant was charged with interfering with commerce through extortion (Hobbs Act). The defendant was charged with interfering with the importation of sand; the evidence and instructions at trial were to the effect the interference could have been for the exportation of sand. The Court reversed:

> "The Grand Jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the Grand Jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the Grand Jury returned." *Stirone, supra,* at 217.

Similarly, in this case, it cannot be said with certainty whether the jury convicted on a new basis and on evidence never considered by the indicting Grand Jury, that shipments, other than those identified by the documents, were diverted.

In *United States v. Crocker*, 568 F. 2d 1049 (3 Cir. 1977), this Court reversed a conviction holding that in

view of the specificity of the Grand Jury indictment as to certain facts, the introduction of evidence regarding different facts and events amounted to a constructive amendment of the indictment, constituting reversible error.

In *Crocker*, the defendant was charged and convicted of making false declarations before a Grand Jury investigating illegal payments by record companies. The indictment specifically named the individual from whom the defendant allegedly received certain payments. The government produced a witness who testified that he, too, had given the defendant payments for playing specific records on numerous occasions. Defense counsel objected since the acts alleged by this witness were neither charged in the indictment nor discussed in the defendant's Grand Jury testimony. At first, the trial court excluded the evidence for all purposes, both as substantive proof and as proof of motive, intent or plan. It later reversed its ruling and admitted this evidence. The defendant contended there was no indication that these activities formed the basis for the Grand Jury indictment and that the Fifth Amendment precluded him from being convicted on a charge that the Grand Jury did not make.

In this case, the trial court constructively amended the indictment by allowing Scott to testify that there were seven other shipments of gasoline on dates other than those charged in the indictment. Consequently Scott's testimony regarding different shipments, different dates, and a different product (gasoline rather than fuel oil) was a constructive amendment in view of the specificity of the indictment, Bill of Particulars, Scott's Grand Jury testimony, and the Government's exhibits of its evidence-in-chief.

The Court noted in *Crocker* that if there is no amendment to an indictment, but only a variance, the problem is not one of usurping the constitutionally guaranteed role of the Grand Jury, but one of promoting the fairness of the

trial and ensuring the defendant notice and an opportunity to be heard. However, the Court discussed that the Supreme Court in *Stirone v. United States, supra,* recognized that even though a trial court may not formally amend an indictment, it could accomplish the practical result of trying a defendant on a charge for which he was not indicted by a Grand Jury if it permitted proof of facts of an essential element of an offense which were different than those charged in the indictment. Regarding this, the Court stated:

> "The trial court would not be permitted, in the guise of a variance, to accomplish a constructive amendment so as to modify the facts which the Grand Jury charged as an essential element of the substantive offense. This was true even though, as the *Stirone* opinion acknowledged, the indictment could have been drawn in general rather than in specific terms." *Crocker, supra,* at 1060.

The Court then asserted the basic difference in result between a constructive amendment and a variance:

> "The consequence of a constructive amendment is that the admission of the challenged evidence is *per se* reversible error, requiring no analysis of additional prejudice to the defendant." *Crocker, supra,* at 1060.

The Court further indicated that such factors as the elements of the offense, the allegations in the indictment, and the nature of the evidence are important in determining whether a constructive amendment or variance occurred. In *Crocker,* the Court concluded a constructive amendment occurred so as to effectively charge an entirely different factual basis for falsity which is exactly what happened in this case.

This indictment charged that Jock and Ashman caused phone calls to be transmitted for the purpose of executing a scheme to divert fuel oil from Paradee to Forte on or about August 5, 1977. The phone calls were related to a specifically identified shipment of fuel oil. The shipment alleged was never diverted. The jury was advised by Scott that he did divert shipments, however, not necessarily the one in question. Clearly, the Grand Jury never considered whether shipments other than those earmarked by the documents could have occurred. Yet, the court allowed the petit jury to consider such evidence.

Clearly, the *Stirone* and *Crocker* cases mandate that evidence adduced at trial must be in support of the crimes charged by the Grand Jury. If evidence is in support of other crimes, or if the petit jury is instructed it may convict on other crimes, a defendant is unjustly called upon to defend charges for which he was not indicted, which is what happened in this case. On this issue, the court in *United States v. Goldstein,* 386 F. Supp. 833, 840-841 (D. Del. 1973), reversed on other grounds, 502 F. 2d 526 (3 Cir. 1974) succinctly stated the test to be applied:

> "The proper test is whether there is reasonable assurance from the fact of the indictment that the Grand Jury found probable cause on each of the essential elements which underlie the petit jury's verdict. Thus, where the difference between the proof and the indictment is such that there is no reasonable assurance on the face of the indictment that the Grand Jury considered and reached an affirmative conclusion upon the existence of each of the essential elements of the crime of which the petit jury was asked to convict, the indictment has been amended."

How can it be said with reasonable assurance that the Grand Jury reached an affirmative conclusion that shipments other than those identified were diverted? Both Jock and Ashman were indicted for phone calls in support of the theft of fuel oil from Getty Oil Company on August 5, 1977. They were not accused by the Grand Jury of phone calls in support of a shipment around or near that date, or between July 22 and August 17. Yet the trial court permitted Scott to testify, over objection, that other shipments could have been involved, other than those identified in the indictment, Grand Jury testimony, Bill of Particulars and the Government's evidence-in-chief.

Moreover, the trial court's instructions compounded this constructive amendment of the indictment by allowing the jury to convict for shipments a day before or a day after the date in the indictment. This alone created prejudicial error.

It is clear that the crux of the indictment is not the existence of phone calls but whether there was a diversion of oil. It cannot be reasonably argued that it is unimportant that the actual diversion of oil never occurred. Indeed, the Government itself noted that "the use of interstate communication is logically no part of the crime itself. It is included in the statute *merely* as a grounds for federal jurisdiction. The essence of the crime is the fraudulent scheme itself" citing *United States v. Blassingame,* 427 F. 2d 329, 330 (1970).

Consequently, it is strongly urged that the actual time, place and date of the alleged diversion of August 5, 1977 is not only relevant, but is absolutely critical to the prosecution.

Moreover, the indictment charged that the call was made in furtherance of the shipment; the overt acts in the conspiracy count disclosed that Ashman and Scott talked by telephone; and the Bill of Particulars added that the telephone calls set up the shipment of fuel oil from Getty

Oil Company on August 5, 1977. Consequently, the timing of the phone calls was tied directly into the shipment.

Assuming *arguendo* the evidence pertaining to the diversion of the delivery related only to the success of the scheme, and further assuming that such evidence is irrelevant, it cannot be stated with certainty what effect this evidence had upon the indicting Grand Jury. The fact is that the evidence of the time, date and place of the diversion of the August 5, 1977 shipment, supported by documentation, was presented to the Grand Jury and did influence their return of an indictment on Count V. There is no way of knowing what the action of the Grand Jury would have been had such evidence not been presented. Simply because the Government asserts that the evidence is not relevant does not minimize the impact of having presented that evidence to the Grand Jury. Consequently, the evidence at issue was quite relevant; and even if it was not, it was nevertheless considered by the Grand Jury in returning the indictment.

Finally, it is submitted that the Grand Jury indicted Jock and Ashman based upon an entirely different subject matter. Fuel oil and gasoline in bulk are as different as apples and oranges. The August 5, 1977 shipment from Getty Oil Company involved fuel oil as charged in the indictment and Scott testified he only delivered gasoline. (N. T. 876).

Consequently, the Grand Jury charged that Jock and Ashman used the telephone in setting up a theft of oil from Getty Oil Company on August 5, 1977. The proof at trial was that gasoline was stolen from some other unknown place and only possibly on or around August 5, 1977. The proof ultimately adduced at trial varied entirely from that offered to the Grand Jury, resulting in Jock and Ashman's trial on charges for which they were not indicted. A reversal must follow *per se*.

The trial court held there was no constructive amendment of the indictment. It reasoned that the proof of the essential elements of the wire fraud charge did not differ from what the Grand Jury had alleged because the Grand Jury charged in Count V of the indictment that an interstate telephone call was placed on or about August 4, 1977 and that there was evidence of a telephone call and a scheme to defraud. The trial court completely overlooked the perjurious Grand Jury testimony of Paul Scott, plus the documents, which were the sole basis for the return by the Grand Jury of Count V of the indictment. The trial court also completely overlooked the fact that the scheme to defraud involved the alleged diversion of fuel oil on August 5, 1977 which never happened.

In summary, Jock and Ashman submit that the indictment was constructively amended when the trial court allowed Scott to testify Jock and Ashman stole other shipments of gasoline in July and August when the indictment charged them with a theft of fuel oil on August 5, 1977.

II. The Variance Between the Indictment and Proof Adduced at Trial Unduly Prejudiced Jock and Ashman.

The *Crocker* reasoning is based upon the duty of the Grand Jury in assuring a citizen is free from unfound charges and the concurrent duty to defend the same. *United States v. Goldstein*, 502 F. 2d 526, 529 (3 Cir. 1974). Jock and Ashman herein rely upon another cornerstone of the indictment: the notice to the accused of the charges he must defend. Variance from the allegations in the indictment and proof adduced at trial must be weighed against the prejudice suffered by the defendant. This is a rule of due process. Under the due process reasoning, this Court must review the facts of this case.

Jock and Ashman were charged in Count V of the indictment with causing phone calls on or about August 4, 1977 for the purpose of executing an illegal scheme to steal fuel oil. Moreover, Jock and Ashman were advised that Paul Scott communicated with Harry Ashman on or about August 4 (Count I, paragraph 6g), which communication was allegedly to set up a diverted fuel oil delivery of August 5, 1977. (Count I, paragraph 6h). Clearly the Government's theory was that Jock and Ashman set up the aforementioned delivery by phone calls on the date specified. The Bill of Particulars provided by the Government was equally clear regarding the alleged dates of the calls and deliveries.

Any ambiguity or uncertainty in the dates of the deliveries and calls supporting them were cured by the Government's supplying the defense with Paradee purchase orders and oil company invoices pertaining to the alleged deliveries. The documents furnished to defense counsel, approximately a month prior to trial, detailed precisely the shipment diverted, the day it was shipped, and in some cases the time of the shipment. Whatever flexibility may have existed in the indictment relating to the date and time of shipment was removed by providing the defense with documents that stated precisely what shipments were allegedly stolen. The documents identified the shipment and, in fact, were the same documents submitted to the Grand Jury.

Obviously, the Government's theory was that shipments denoted by the documents were diverted to Forte Oil Company. To defend these allegations, the defense decided to prove that it was impossible for these shipments to have been diverted to Forte. Armed with the information provided in the indictment, and buttressed by the Bill of Particulars and the documents furnished by the Government, defense counsel meticulously reconstructed Paul

Scott's activities relating to each theft. Ashman and Jock proved by use of objective documentation, such as oil company invoices, terminal dispatch sheets, toll bridge receipts, and driver's logs that Paul Scott could not have diverted oil to Forte on any date alleged and, in fact, probably delivered the oil to bonafide customers as indicated by his driver's logs (none of which indicated deliveries to Forte).[2]

When first faced with this documentary evidence, Scott stated that he could not be sure if he correctly identified the document relating to the alleged August 5 shipment. (N. T. 859).

During cross-examination at his second and final appearance as a government witness during the trial, Scott admitted lying before the Grand Jury and during his first appearance at the trial concerning the fourth shipment on August 5, 1977. Specifically, Scott stated the following:

> "Q. Now, do you recall with regard to the fourth shipment, the one on August 5th, 1977, did you lie about that shipment?
>
> A. No, I did not. *I could have been wrong about the date, but the shipment was right.*
>
> Q. Am I correct in that you told that Grand Jury in clear and unequivocal terms that that particular shipment was fuel oil from the Getty Oil Company on August 5?
>
> A. I could have, I don't recall.
>
> Q. You see the Government's Exhibit, do you not, sir, I believe it's Government's Exhibit 5. The one at

2. Specifically, the defense confronted him with DX-2, his "Driver's Daily Log" for August 5, 1977, in which he himself had indicated that he was on the road during the time he said he was at Forte, that he was in Baltimore, Maryland shortly thereafter, and that he did not get to Getty until six to eight hours after the time he said he had delivered that load to Forte. The defense pointed out that the time marked on GX-5a itself contradicted his story. It introduced other documents, DX-3 and DX-4, which corroborated the time sequence found on DX-2.

Getty Oil Company where you timed in at 9:15 in the morning.

A. If the document says fuel oil, then I said fuel oil.

Q. Are you saying now it's gasoline or fuel oil, which story are we on?

A. It was gasoline.

Q. If it says fuel oil, then you told that Grand Jury that you stole 8,000 gallons of fuel oil on August 5, is that true?

A. *No, it's not true.*

Q. *Did you lie to that Grand Jury concerning that particular transaction?*

A. *Yes.*" (N. T. 876-877). (Emphasis added).

The trial court permitted, over objection, the testimony relating to the possibility of shipments on dates near to the ones alleged in the indictment; it vastly compounded this error in the charge wherein it instructed the jury it could convict if it found such activities were "reasonably" close (within one day) to the dates alleged. (A16-A17).

Jock and Ashman could not claim prejudice if they simply relied upon the presumption of innocence and made no affirmative effort at a defense either through cross-examination or a defense in chief. They could claim no prejudice if the thrust of their defense was that they did not know Paul Scott. They could claim no prejudice if they asserted they had nothing to do with E. Forte Oil Company. They could claim no prejudice if they asserted no telephone communication occurred; that any communication that did occur had nothing to do with stolen oil; that they were mistaken for other persons. The variance between the indictment and proof would have been harmless to all potential defenses except that chosen by Jock and Ashman and one most reasonable to pursue: to affirmatively

prove that it was physically impossible for Scott to have delivered the alleged shipment on August 5, 1977 to E. Forte Oil Company.

By specifically identifying each diverted shipment to an invoice stating unequivocably the date, time, place of origin, quantity, amount, and type of product (with each invoice initialled by Paul Scott), the Government narrowed the scope of permissible proof to those particular shipments which were readily distinguishable and identifiable. The defense strategy was to prove that such shipment so earmarked was not diverted to Forte, as Scott stated, and was consequently either diverted to someone else or properly delivered. This strategy was unarguably successful. Jock and Ashman proved the shipment allegedly diverted on August 5 was picked up approximately five hours *after* it was allegedly diverted (N. T. 235-237; 238-239) and that Scott was in Baltimore, Maryland around the time the delivery allegedly occurred. Finally, Scott admitted he lied when he testified that 8,000 gallons of fuel oil was stolen on August 5, 1977 from Getty Oil Company. (N. T. 876-877).

The Government argued Jock and Ashman were not prejudiced by the information contained in the Bill of Particulars. This is not the case. Jock and Ashman were advised by the Government prior to trial through the indictment, Bill of Particulars *and* exhibits provided, that the Government would prove the diversion of *seven specific* shipments. Upon the information furnished by the Government, Jock and Ashman reasonably, but unfortunately to their prejudice, relied upon the prospective proof at trial of the facts contained in those documents. Indeed, with respect to the Bill of Particulars (although the Government hedged regarding the "on or about" language contained both in that document and in the indictment), paragraph 3 stated precisely where each diversion of product was insti-

tuted. It is difficult to imagine how this information, specifically with regard to August 5, when read in conjunction with the documents, could be more prejudicially misleading.

While the Government states that Jock and Ashman, by proving Scott could not have made the deliveries as he alleged, merely raised some question about Scott's ability to deliver specific loads, it is manifestly evident that the defense disproved the gravamen of the allegations. It is submitted that even if the actual deliveries were not an essential element of the crime or proof thereof, the evidence tending to support such delivery was probative and highly important. It is stressed that this "so called defense" would have completely exonerated Jock and Ashman had the Government not been permitted to amend the indictment and had the prejudicial variance not been allowed.

If Jock and Ashman had been able to foresee that Scott would materially change his testimony and repudiate the documents, they would have been put to the task of reconstructing Scott's activities throughout the entire relevant time period. If they had reconstructed Scott's activities and proven that no deliveries could have occurred, as they likely would have been able to do had they known it would have been necessary, the likelihood of a conviction would have been very remote.

The law is clear that a variance between the allegations of an indictment and the facts proved at trial cannot be permitted where prejudice to a defendant would result, or where such a variance might open the way for future exposure to double jeopardy. *United States v. Mooney,* 417 F. 2d 936 (9 Cir. 1968), *cert. denied,* 397 U. S. 1029 (1969); *Stirone v. United States,* 361 U. S. 212 (1960).

If variance between the indictment and proof affects substantial rights of the accused, the conviction must be

reversed. *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629 (1935); *United States v. Moser,* 509 F. 2d 1089 (7 Cir. 1975). Where the variance is immaterial and does not effect substantial rights of the accused, the conviction can stand. *United States v. Somers,* 496 F. 2d 723 (3 Cir. 1974), *cert. denied,* 419 U. S. 832 (1975). Variance can hardly be considered immaterial or harmless where the defendant is hampered in presenting his defense. See *United States v. Evans,* 398 F. 2d 159 (3 Cir. 1968); *United States v. Perlstein,* 126 F. 2d 789 (3 Cir. 1942), *cert. denied,* 316 U. S. 678 (1943). In the present case, prejudice to Jock and Ashman clearly and unarguably exists.

The evidence showed that certain members of the alleged conspiracy, specifically Paul Scott, were in the business of delivering oil. Thus mere proof that certain deliveries took place within some broad time period is by itself meaningless. Scott, a driver, delivered two to three shipments daily. Forte was in the business of routinely ordering and delivering fuel products. Without specific knowledge as to which deliveries are alleged to be in furtherance of the alleged criminal scheme, Jock and Ashman would have been unable to prepare their defense properly. In this connection, it is crucial to note that the Government filed a Bill of Particulars which stated that the alleged deliveries occurred on exactly the same dates on which the indictment charges certain phone calls were made. The oil company invoices corresponded identically with those dates. Clearly the nexus between the phone calls and the oil shipments was critical to the Government's case, yet this is precisely the area where the Government sought to vary the proof by basing its case on other phone calls and oil deliveries which had taken place on other dates. The Government misled Jock and Ashman and seriously prejudiced them in the preparation of their case.

The Court's opinion in *United States v. Critchley,* 353 F. 2d 358 (3 Cir. 1965) is directly on point. The defendant was charged with violation of the Hobbs Act, the indictment alleging acts disrupting interstate commerce on two specific dates, October 7, and 8, 1962. The Court held that the Government would not be allowed to prove interference with interstate commerce by acts occurring on October 5, 1962, which was two days prior to the dates alleged in the indictment.

Another supportive decision by the Court is *United States v. Figurell,* 462 F. 2d 1080 (3 Cir. 1972). The indictment there alleged that on or about January 12, 1967, the defendant knowingly failed to report a change in his marital status to his local draft board. However, the Government's evidence indicated that Figurell did not have the requisite mens rea until May 15, 1967. In reversing Figurell's conviction and ordering entry of judgment of acquittal, the Court stated:

> "Furthermore, even if there was a continuing duty to report the separation to the local board which could form the basis of a criminal conviction for some later period, since the indictment has charged Figurell with the violation only for the period 'on or about January 12, 1967 . . . conviction for breach of his duty in some period later than a week or two beyond January 12, 1967, would constitute, at least, an impermissible constructive amendment of the indictment.'" *Figurell, supra,* at 1083, note 5.

In the present case, because of the large number of oil deliveries made by Scott during the months of July and August 1977, the Government should have been held to a strict standard of conformity between the allegations of

the indictment and the evidence produced at trial. Unless this strict standard is applied, serious confusion as to the basis of the charges against a defendant results. This confusion prejudiced Jock and Ashman in their preparation for trial and potentially exposed them to future prosecutions for the same offenses.

Similar issues were also raised in *United States v. Lippi,* 190 F. Supp. 604 (D. Del. 1961). Lippi was indicted under the Labor Management Relations Act, 29 U. S. C. A. § 186(b) which proscribed certain receipts of "any money or other thing of value". The indictment accused Lippi of wrongfully receiving $3,617,52 of "money." The proof offered by the prosecution at trial consisted of allegations that $3,617.52 was paid on behalf of the defendant as premiums on insurance policies. The defense vigorously objected to any testimony other than that alleging the wrongful receipt of "money." After the defendant was convicted, the court, on motion for a new trial, ordered arrest of judgment. The court noted:

> "An accused has a fundamental right to be informed of the charges against him so that he may adequately prepare for trial . . . [T]he Court is of the opinion that defendant had a right to rely on the charges so framed ['money' rather than 'other things of value'] and that the government is bound by them. Counsel's preparation and investigation may vary radically depending upon whether receipt of 'money' or 'things of value' or both is charged." *Lippi, supra,* at 606-607.

The Government urged the court to reconsider, arguing principally that "money" included most forms of wealth and property. Judge Wright was unmoved. At 193 F. Supp. 441, 443 he stated:

> "The issue is not whether counsel is in fact surprised but whether there is a substantial possibility, tested

from the perspective of the presumption of innocence, that *co-counsel will be unprepared to meet proof inconsistent with the charges in the indictment.*" (Emphasis added.)

The court stated that although the rule could be harsh, it could be justified on several grounds. Two grounds offered by the court were:

"First, actual surprise may be exceedingly difficult to prove. Second, the rule discourages indifference and carelessness in the exercise of the prosecutory function, a critical role in an accusatory system such as ours." *Lippi, supra,* at 442, 443.

After the Government learned that Scott had lied, at least several hundred times during his first appearance at the trial, Scott appeared a second time and admitted that he incorrectly identified the government exhibit (G-5) for the fourth load. (N. T. 859). He, however, testified that he believed, but was not sure, that he made a delivery on that night. (N. T. 859).

It is important to realize the indictment, the Bill of Particulars, and the Government's exhibit describe the shipment as a theft of fuel oil. Without question, fuel oil is materially different than gasoline which is ultimately what Scott testified was stolen. It is submitted that the Government will find it difficult, if not impossible, to distinguish between the *Lippi* case and this case. No matter how imaginative the Government may be, gasoline is different than fuel oil—as different as apples and oranges.

In the case at bar, counsel submits it demonstrated an effective ability to disprove allegations brought by the Government by fastidiously reconstructing the deliveries of Scott. Scott was forced to admit that each relevant shipment did not occur as he and the Government alleged;

and that the documents offered into evidence did not refer to diverted shipments. Scott, instead, insisted that deliveries still occurred but possibly at times around or reasonably close to those originally alleged. The trial court impliedly agreed, allowing the jury to convict if it found the shipments occurred reasonably close to the dates alleged. The trial court, in its charge stated:

"The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient under the law if the evidence . . . establishes . . . that the offense was committed on a date reasonably near the date alleged. Reasonableness is to be determined with reference to the circumstances of the entire case and the preparation task of the defense in the case. In this case, I instruct you that a finding *of a telephone call or an overt act within one day before or after the date alleged* would be the finding of a date reasonably near the date alleged . . ." (Emphasis added). (A16-A17).

Had the Government not offered the defense invoices denoting with particularity the time and origin of the shipment, as well as the product shipped, Jock and Ashman would have reconstructed Scott's activities for the thirty-two days from July 22 through August 17. They did not because they were advised that the Government would prove the shipments were diverted earmarked by the invoices. Consequently, Jock and Ashman were unprepared to rebut Scott's allegations that the alleged deliveries occurred "somewhere around" the dates alleged. It is further submitted that if given the opportunity, Jock and Ashman probably could have been equally successful in disproving Scott's amended allegations.

With regard to reliance and preparation by the defense, in *United States v. Glaze,* 313 F. 2d 757 (2 Cir.

1963) the defendant was convicted of two drug charges following a trial in which the prosecution supplied a Bill of Particulars stating that only one government agent, Robinson, observed a specified illegal sale. Robinson testified that not only he but another agent, Scott, was present. The defense moved to strike the testimony as not limited to the Bill of Particulars, in that the proof was that two agents witnessed the sale while the Bill of Particulars specified one agent. The defendant's motion to strike was unsuccessful and he asserted prejudicial variance upon appeal.

The court recognized the proof varied with the Bill of Particulars and went on to examine prejudice. The defense alleged it could have prepared differently for trial had it been adequately apprised in the Bill of Particulars. The court did not agree and noted:

> "The fact remains that defendant was clearly apprised by the bill of particulars of the exact place, date, and hour of each violation, as well as the fact that transactions with agent Robinson were to be the foundation of the charges brought to trial. . . . We cannot find, therefore, that defendant has made a sufficient showing of actual and substantial prejudice resulting from unfair surprise." *Glaze, supra,* at 760.

Significantly, the *Glaze* Court noted that the Bill of Particulars was accurate regarding "exact place, date and hour." Just the opposite is true in this case. It is submitted that if the proof in *Glaze* varied from the Bill of Particulars with respect to place, date or hours of meeting, the result on appeal could have been quite different.

Other courts have noted the consideration of elemental fairness in evaluating the impact of misleading government information. In *United States v. Goldstein,* 386 F. Supp. 833, 837 (D. Del. 1974), the court noted:

> "The rules governing the content of indictments variances and amendments are designed to protect three important rights . . . [including] the right under the Sixth Amendment to fair notice of the criminal charge one will be required to meet."

That court expanded at p. 840:

> "The rule that a material variance between the indictment and the proof requires reversal . . . is founded on the necessity of preserving [the Sixth Amendment rights, consequently] a variance will be considered material if the defense has been substantially prejudiced . . ."

It is difficult to imagine a case where the defense could have been more prejudiced than that herein.

III. The Evidence Produced at Trial by the Government Regarding Count V Was Insufficient to Establish the Requisite Elements of Wire Fraud, 18 U. S. C. § 1343, in That the Alleged Calls Were Not Interstate Nor in Furtherance of a Scheme to Defraud.

Count V alleged a violation of the wire fraud statute, 18 U. S. C. § 1343. Specifically, it charged that on or about August 4, 1977, Jock and Ashman transmitted or caused to be transmitted an interstate phone call between Delaware and New Jersey for the purpose of executing the alleged scheme to defraud.

Scott testified that on August 4, 1977 he placed calls from his personal residence in Dover, Delaware to Ashman's personal residence in Blackwood, New Jersey. He identified two toll calls on his telephone records as being the calls made by him to Ashman. He never testified that he spoke to Ashman as a result of these calls and, if he did,

Scott perjured himself because Ashman was in Brooklyn, New York at the time of the calls.

The toll call records of Paul Scott did show that on August 4, 1977 there were two calls from Scott's residence in Dover, Delaware to Ashman's residence in Blackwood, New Jersey; one at 2:02 p.m. and the other at 2:04 p.m. Each call was of two minutes duration or less.

However, only speculative evidence was presented regarding the nature or purpose of these calls and no evidence was ever presented at trial to establish that Ashman ever received a phone call from Scott. Both Jock and Ashman were convicted on Count V. On post trial motions the trial court held that "the evidence was sufficient for the jury to find that on or about August 4, 1977 there were interstate phone calls between Scott and Ashman which were in furtherance of the alleged scheme to defraud." Jock and Ashman submit the evidence presented by the Government at trial was insufficient for a jury to find that an interstate call was made and that the call was made for the purpose of executing or in furtherance of the alleged scheme to defraud since there is no testimony that Ashman answered the call and if there is Scott lied again.

The wire fraud statute, 18 U. S. C. § 1343 provides in relevant part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, *transmits* or causes to be transmitted by means of wire . . . communication in *interstate . . . commerce,* any . . . sounds *for the purpose of executing such scheme or artifice,* shall be fined . . ." (Emphasis added).

It is well settled that two basic elements must be proven by the prosecution beyond a reasonable doubt in order to

sustain a conviction under this statute. First, there must exist an *interstate* telephone communication in order to invoke the federal statute. *United States v. Patterson,* 534 F. 2d 1113 (5 Cir. 1976). This means a completed call to the other party in furtherance of the scheme to defraud which is impossible in this case since Ashman was over 100 miles away at the time.

Second, this interstate communication must be used "for the purpose of executing the scheme" and must be an essential part and in furtherance of the scheme. *Pereira v. United States,* 347 U. S. 1, 74 S. Ct. 358 (1954); *Parr v. United States,* 363 U. S. 370, 80 S. Ct. 1171 (1960); *United States v. Tarnopol,* 561 F. 2d 466 (3 Cir. 1977).[3]

As the court in *United States v. Marino,* 421 F. 2d 640 (2 Cir. 1970) held, where the purpose of a *particular* phone call, which is the basis of a count under wire fraud, is unclear, it fails to fulfill the requirement that the communication be "for the purpose of executing such scheme." The court there vacated the conviction under that count. Consequently, with regard to each count, the Government must prove there existed a phone call within the statute, i.e., that the three elements are established regarding that call:

a. origin;

b. destination; and

c. wrongful purpose.

Proof of the first two facts above stated are required in order to establish the "jurisdictional" element that the

3. As the Court in *United States v. Tarnopol, supra* held, since 18 U. S. C. §§ 1341 (mail fraud) and 1343 (wire fraud) limit the relevant use of mails or wires to use for the purpose of executing a scheme to defraud, they are *in pari materia,* and are, therefore, to be given similar construction and accordingly, cases construing the mail fraud statute are applicable to the wire fraud statute.

call be interstate and the last fact was required to establish the other element of wire fraud. Clearly, while several statements by Scott grouped together may have established these elements, the law requires that these elements be proven as to *each* of the wire fraud counts.

In this case, the testimony of Paul Scott concerning the nature of the phone calls between Ashman and Scott is equivocal and ambiguous. Count V involved alleged phone calls between Scott and Ashman on August 4, 1977. The substance of the Government's evidence concerning this wire fraud count consisted of Paul Scott's testimony allegedly corroborated by the toll call records. The Government never established with regard to these calls of August 4, 1977 the three required elements. Even the toll slips cannot be relied upon to fill this gap.

Anyone can answer telephone calls and the call shows on the toll slip. The Government seems to believe that the toll slips, *per se*, establish the element of an interstate call. This is fallacious—it is clearly wrong! Moreover, it cannot be assumed that either of the two calls on August 4, 1977 satisfied the "purpose" requirement. There are two recorded phone calls from Scott to Ashman on August 4, one at 2:02 p.m. and another at 2:04 p.m. Again, the Government never inquired of Scott the purpose of these calls. Indeed, in light of the fact that Mr. Ashman was out of town on this date, at the time of the phone calls and no message was left, it must be concluded these calls were not for arranging deliveries and hence, not in furtherance of any alleged scheme to defraud.

In support of its conclusion regarding Count V, the trial court held:

> "The telephone toll call records (GX-17, 19) show that on August 4, 1977, there were two calls from Scott's residence in Dover, Delaware to Ashman's residence in Blackwood, New Jersey, one at 2:02 P. M. and the other at 2:04 P. M. Scott testified that he placed those phone calls. (T. 218-9). Scott also testified that those calls related to the delivery of fuel products to Forte. (T. 233)." (A20).

This was the sole basis given by the trial court for its holding regarding Count V and in light of this, Jock and Ashman maintain the trial court was erroneous in its decision. Regarding Scott's testimony that he placed the two phone calls on August 4, 1977, he never testified that he spoke with Mr. Ashman on either occasion, but only stated he made the call to that phone number. (N. T. 218-9). Thus, this testimony alone was not sufficient for the trial court to hold as it did.

The only testimony relied on by the trial court regarding Count V was the question by defense counsel and answered by Scott during cross-examination. It was as follows:

> "Q. Mr. Scott, referring back to your direct testimony concerning these various telephone calls on 8/4/77, am I correct in stating that according to your testimony that these calls and *there were several with various parties* were all with regard to the delivery of either fuel oil or gasoline to Forte Oil on 8/5?
>
> A. That's correct." (N. T. 233). (Emphasis added).

Regarding this testimony, Jock and Ashman maintain it was clearly insufficient for the trial court to base its holding on regarding Count V. It is submitted the above colloquy did not establish that the two phone calls made by Scott on August 4, 1977 were in furtherance of the alleged scheme to defraud.

Indeed, Scott's answer is ambiguous as evidenced by the question itself. Mr. Kidd did not refer to any specific call on August 4, 1977 but, rather stated there were "several with various parties." Consequently, the answer given by Scott could not in any way be interpreted as referring to *any* particular call he may have made on that date with *any* person in particular.

Second, the question drew for a legal conclusion and thus is irrelevant and should not have been considered by the trial court at all, let alone as sole support for its holding regarding Count V. When Scott answered in the affirmative, he, as a layman, could not have understood the legal implications of such a question. He clearly could have meant that the phone calls were an attempt to further a scheme in that he would not have been calling Ashman for any other purpose, but that *in fact* it did not further the scheme at all since he did not, in fact, speak with Ashman or have any conversation with anyone whatsoever regarding the alleged deliveries. Since Ashman has a wife and seven children who are at home during the day while he is working, it is likely that one of these persons answered the telephone.

Accordingly, there was insufficient evidence as a matter of law adduced at trial to allow Count V to be considered by the jury on the elements of the interstate call and in furtherance of the scheme to defraud.

IV. The Trial Court Erred in Refusing to Grant a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the Grounds of Newly Discovered Evidence Regarding Count V.

Jock and Ashman were convicted on Count V of the indictment for wire fraud which involved two telephone calls allegedly made from Paul Scott to Harry Ashman on

August 4, 1977 relating to the delivery of fuel on August 5, 1977. The trial court granted their Motions for Judgment of Acquittal as to the remaining wire fraud counts, but denied it with regard to Count V. Jock and Ashman contend that a new trial should have been granted or, alternatively, the trial court, upon reconsideration, should have granted their Motions to Vacate Judgment based on newly discovered evidence.

The after-discovered evidence in support of these allegations discloses that Mr. Ashman reported to work at Shanahan Motor Freight at approximately 5:30 a.m. on August 4, 1977 and that he picked up tractor #182 and proceeded to General Felt Industries on Wheat Sheaf Lane, Philadelphia, Pennsylvania to pick up their trailer #142. Ashman then proceeded to make three deliveries in and around Long Island and New York City on that date. After completing these deliveries, he made a pick up of 756 bags of sugar from SuCrest Company in Brooklyn, New York. The bill of lading from SuCrest Company clearly shows that Mr. Ashman signed the bill of lading and it is time-stamped "AUG 4 1:03PM '77".

Furthermore, after weighing in at SuCrest, the time-stamp was entered on the bill of lading and at that same time, he presented his driver's license for identification. The bill of lading disclosed the name of the checker who corroborated Mr. Ashman being present at SuCrest on the date and at the time reflected on the bill of lading. The weigh-in logs maintained by SuCrest also showed that Mr. Ashman arrived at 11:00 a.m. and left at 1:24 p.m. His signature appears twice next to the above two times on the weigh-in sheet and are time-stamped.

Further documentary evidence in support of Jock's and Ashman's contention that it was physically impossible for Mr. Ashman to have received telephone calls in his home

at 2:02 p.m. and 2:04 p.m. on August 4, 1977 is the dispatch sheet obtained from Shanahan Motor Freight which corroborates his pick up at SuCrest and the three deliveries made in Long Island and New York City area. Both Mr. and Mrs. Ashman kept contemporaneous diaries regarding their daily events. Mrs. Ashman's diary showed that Mr. Ashman returned home at 6:30 p.m. on August 4, 1977. Mr. Ashman's work diary showed that he was in New York City at SuCrest in Brooklyn on August 4, 1977.

As further proof of this contention, on September 20, 1978, W. H. Gilman, Jr., of General Felt Industries, furnished a copy of the visitors' register for August 4, 1977 which disclosed that Harry Ashman of Shanahan Motor Freight checked in at 6:50 a.m. and left at 7:10 a.m. for deliveries in the Long Island and New York City area.

On September 21, 1978, Salvatore DiBella was interviewed by Jock's investigator, Charles Thude, at SuCrest Corporation in Brooklyn, New York. Mr. DiBella is a checker and advised that the following procedure applied to the bill of lading #397172 for a shipment of 756 bags of sugar from SuCrest Corporation consigned to Frankford Quaker Grocery Company to be delivered by Shanahan Motor Freight.

Harry Ashman, a driver for Shanahan Motor Freight Inc., arrived at approximately 11:43 a.m. at the scale and was weighed-in and given a weight ticket which was taken to the warehouse by Ashman who is assigned a parking spot at the loading dock. From 12:00 to 1:00 p.m. the warehousemen are at lunch and at 1:03 p.m. the loading began for Ashman's bill of lading. At 1:20 p.m. on August 4, 1977, the loading of the 756 bags was complete and the truck again was driven back to the scale where it was again weighed at 1:23 p.m. Accordingly, Ashman could not have left the premises at SuCrest Corporation until, at least, 1:23 p.m. The weigh-in document of SuCrest Corporation #D10386 showed that Ashman's truck was weighed at 11:42 a.m. on August 4, 1977 and again weighed at 1:23 p.m. on August 4, 1977.

In light of these documents, it is uncontrovertible that it was physically impossible for Harry Ashman to have been in his personal residence in Blackwood, New Jersey, which is over one hundred miles from Brooklyn, N. Y., to receive telephone calls from Paul Scott at 2:02 p.m. and 2:04 p.m. on August 4, 1977. Moreover, the trial court acknowledged in its opinon the evidence indicated that Scott did not talk to Ashman. (A36).

As to the requirement that due diligence by the defendants' attorneys must have been exercised, neither the Indictment nor the Bill of Particulars submitted by the Government alleged that the delivery of August 5, 1977 involved the phone calls at 2:02 p.m. and 2:04 p.m. from the prior date of August 4, 1977.

Moreover, defense counsel's investigation disclosed that any phone calls that could have set up a theft were supposed to have occurred after 5:00 p.m. or in early evening because Scott did not know if he could make a delivery until he reviewed the dispatch sheet which was not given him until the evening before the delivery. Therefore, Ashman's counsel never pursued the whereabouts of Ashman on the afternoon of August 4, 1978. Neither Jock, Ashman nor their counsel had any knowledge prior to the trial that *the afternoon* of August 4 would be a crucial period of time relevant to the issues at hand.[4]

4. Jock's counsel, Ronald F. Kidd, submitted an affidavit to the effect that none of the information set forth above was brought to his attention or was in his knowledge prior to the date stated in the affidavit. Additionally, Mr. Segal, Ashman's attorney, had no knowledge of this information prior to that date either as evidenced by his affidavit.

It was not until Scott, the habitual liar, testified at trial that Ashman's counsel was aware that he should have traced Ashman's whereabouts on the afternoon of August 4, 1977.

In fact, when Scott first testified (N. T. 147), he still indicated the calls were in the evening. (N. T. 161, 164, 208, 210). For example, when questioned on direct examination, Scott stated:

> "Q. Now, directing your attention to the *night of August 4, 1977*, did you have any telephone conversations with Mr. Ashman on *that evening*?
>
> A. Yes, I did.
>
> Q. And what did you discuss?
>
> A. He wanted to know if I could get any more oil." (N. T. 164) (Emphasis added).

It is contended that both counsel were misled since Scott repeatedly testified during the trial that *the night* of August 4 was the relevant time period.

Indeed, even if Ashman's counsel should have been aware of these facts, certainly Jock's counsel had no duty to pursue Mr. Ashman's whereabouts on the afternoon of August 4, 1977 because there were no telephone calls at all involving Scott and Jock. The trial court's ruling, and its reasons in support thereof, are completely erroneous. The trial court cited one brief statement made by Mr. Segal, Ashman's attorney, for the proposition that the defense of Jock and Ashman was a joint effort on the part of the defense attorneys. (A34).

In view of this alleged admission, it held that the newly discovered evidence was in fact not newly discovered. It reasoned that since Jock and Ashman conducted a joint defense, the evidence concerning Ashman's whereabouts was imputed as being available to Jock before

trial. However, Jock vigorously submits that he cannot be held to have had constructive knowledge of this information nor did he have any duty whatsoever to seek out this information, and thus, it was newly discovered, at least, as it pertains to him.

In determining whether a new trial should be granted on the basis of newly discovered evidence, there are several factors which must be considered. In *United States v. Ianelli*, 528 F. 2d 1290, 1292-3 (3 Cir. 1976), the Court stated:

> "Generally five requirements must be met before a district court will order a new trial on the ground of newly discovered evidence:
>
> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such a nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

United States v. Howell, 240 F. 2d 149, 159 (3 Cir. 1956). Accord, *United States v. Meyers*, 484 F. 2d 113 (3 Cir. 1973); *United States v. Bertone*, 249 F. 2d 156, 160 (3 Cir. 1957); *United States v. Nigro*, 253 F. 2d 587 (3 Cir. 1958); *United States v. Robinson*, 329 F. Supp. 723 (D. Del. 1971).

Clearly, the defendants can show that while the evidence could have been discovered by Ashman's counsel at the time of trial, any "lack of diligence" should be excused by the Court for sufficient reasons as set forth more

fully above. *United States v. Ianelli*, 455 F. 2d 921 (3 Cir. 1976). This is especially true in light of the laborious effort expended by counsel in reconstructing Scott's activities and proving the alleged thefts could not have occurred.

In light of this, it is submitted that all due diligence was exercised and that in light of the above-noted facts, even if this Court finds that due diligence was not exercised, it should have been excused for the above-noted reasons. If this relief is not granted, both Jock and Ashman stand convicted of wire fraud emanating from phone calls which *could not have been made,* in support of a theft which *could not have occurred.*

Jock submits that his counsel exercised due diligence and that, at least, as regards to him, it is newly discovered evidence by his counsel after trial. The evidence is not cumulative or impeaching. The newly discovered evidence demonstrates that it was physically impossible for Ashman to have received the telephone calls from Scott on August 4, 1977 which calls are an essential element of the conviction and therefore, the newly discovered evidence would produce an acquittal.

The newly discovered evidence again demonstrates that Scott was a habitual liar and perjurer and, in fact, he specifically lied if he testified that he spoke to Ashman at his residence on August 4, 1977.

When all the evidence is viewed most favorable to the Government, Jock and Ashman were convicted of fraud involving a telephone call which could not have occurred, because Ashman was in New York, to set up a theft of fuel oil which was delivered to some other customer. As ludicrous as it sounds, that is what this case is about!

VI. Conclusion.

For all of these reasons, Jock and Ashman request this Honorable Court to reverse the conviction on Count V of the Indictment.

Respectfully submitted,

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Appendix.

JUDGMENT AND PROBATION/COMMITMENT ORDERS.

UNITED STATES DISTRICT COURT
FOR DISTRICT OF DELAWARE

CR 78-11

UNITED STATES OF AMERICA

v.

FRANK JAMES JOCK,
Defendant

Judgment and Probation/Commitment Order.

In the presence of the attorney for the government the defendant appeared in person on this date 11/1/78 with counsel Ronald F. Kidd, Esq.

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, and knowingly, did devise and intend to devise a scheme and artifice to defraud and for obtaining property, by means of the following false and fraudulent pretenses and representations from Paradee Oil Company, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so did transmit and cause to be transmitted in interstate commerce by means of wire communications, that is, a tele-

phone communication between Delaware and New Jersey, certain signs, signals, and sound. All in violation of 18, United States Code, Section 1343.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for a term of Imprisonment of four years.

IT IS FURTHER ADJUDGED that the execution of the sentence hereby imposed is suspended until 2:00 P.M. on 11/8/78, at which time defendant shall report and voluntarily surrender at the institution designated for service of this sentence.

/s/ WALTER K. STAPLETON,
Hon. Walter K. Stapleton,
U. S. District Judge

Date 11/2/78

UNITED STATES DISTRICT COURT
FOR DISTRICT OF DELAWARE

CR 78-11

UNITED STATES OF AMERICA

v.

HARRY ASHMAN,
Defendant.

Judgment and Probation/Commitment Order.

In the presence of the attorney for the government the defendant appeared in person on this date 11/1/78 with counsel Robert I. Segal, Esq.

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, and knowingly, did devise and intend to devise a scheme and artifice to defraud and for obtaining property, by means of the following false and fraudulent pretenses and representations from Paradee Oil Company, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so did transmit and cause to be transmitted in interstate commerce by means of wire communications, that is, a telephone communication between Delaware and New Jersey, certain signs, signals, and sound. All in violation of 18, United States Code, Section 1343.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to

the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a term of four years, and upon the condition that the defendant be confined in a jail type or treatment institution for a period of three months, the execution of the remainder of the sentence as to imprisonment is suspended, and the defendant is placed on probation for five years from the date of his release from confinement on the following terms and conditions:

1. That he obey all federal, state and local laws.

2. that he comply with the rules and regulations of the Probation Department.

IT IS FURTHER ADJUDGED that the execution of the sentence hereby imposed is suspended until 2:00 P.M. on 11/8/78, at which time defendant shall report and voluntarily surrender at the institution designated for service of this sentence.

/s/ WALTER K. STAPLETON,
Hon. Walter K. Stapleton,
U. S. District Judge

Date 11/2/78

LOWER COURT OPINIONS

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 78-11

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK JAMES JOCK and
HARRY ASHMAN,
Defendants.

James W. Garvin, Jr., Esquire, United States Attorney, William C. Carpenter, Jr., Esquire, Assistant United States Attorney, Wilmington, Delaware; Ronald G. Cole, Esquire, U. S. Department of Justice, Philadelphia Strike Force, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Ronald F. Kidd, Esquire of Duane, Morris and Heckscher, Philadelphia, Pennsylvania, Attorney for Defendant Jock

Robert I. Segal, Esquire of Perlstein and Segal, Philadelphia, Pennsylvania, Attorney for Defendant Ashman

Opinion

Wilmington, Delaware
September 8, 1978

STAPLETON, *District Judge:*

Frank Jock, Harry Ashman and Paul Scott were indicted on eleven counts revolving around allegations that

they had stolen seven shipments of fuel oil. Count I alleged a conspiracy to violate the provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U. S. C. § 1962(d). Counts II through VIII charged the defendants with seven instances of wire fraud, in violation of 18 U. S. C. § 1343. Counts IX and X charged the defendants with two instances of theft from interstate shipment, in violation of 18 U. S. C. § 659. Count XI charged the defendants with a violation of RICO, 18 U. S. C. § 1961, *et seq.*

Prior to trial, Scott entered into a plea agreement with the government, whereby he plead guilty to Count I and the government agreed to dismiss the remaining counts against him. Jock and Ashman were tried before a jury from July 10 to 18, 1978. At the close of all of the evidence, Jock and Ashman moved for judgments of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. At that time, the Court granted the motions of both defendants for judgments of acquittal on Counts IX and X, the theft from interstate shipment charges. The Court reserved decision on the motions regarding the remaining counts, pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, and submitted the case to the jury.

As to defendant Jock, the jury returned verdicts of not guilty on Counts II, IV, VII and VIII, and verdicts of guilty on Counts I, III, V, VI and XI. As to defendant Ashman, the jury returned verdicts of not guilty on Counts II, III, IV, VII and VIII, and verdicts of guilty on Counts I, V, VI and XI. After the jury had been discharged, both defendants renewed their motions for judgments of acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, and moved, in the alternative, for a new trial on the counts on which they were convicted,

pursuant to Rule 33 of the Federal Rules of Criminal Procedure. It is those motions which are currently before the Court.

I. The Background and Evidence.

Paradee Oil Co. ("Paradee") and Forte Oil Co. ("Forte") are wholesale distributors of petroleum products. Scott was a truck driver for Paradee whose job it was to pick up loads of fuel oil and gasoline from refineries and warehousing facilities in the Delaware, New Jersey, Pennsylvania and Maryland area and to deliver those loads to Paradee facilities located primarily in Delaware.

Scott resided in Dover, Delaware. Jock, who resided in Newark, Delaware, had a proprietary interest in Forte, which is located in Atco, New Jersey. Ashman, who resided in Blackwood, New Jersey, was a friend of Jock and was also associated with Forte. A fourth participant in the alleged scheme was one Randolph Dickerson of Camden, New Jersey, an unindicted co-conspirator, and a friend of Scott.

The grand jury indictment alleges a scheme wherein Jock and Ashman, through Forte, were receiving shipments of fuel oil stolen from Paradee by Scott. More specifically, it is alleged that "on or about" seven dates in July and August of 1977, Scott had interstate telephone communications with Ashman for the purpose of arranging deliveries of stolen fuel oil to Forte, and that following those communications, Scott delivered loads of fuel oil to Forte.

The dates which the indictment alleges that the telephone calls and deliveries occurred were on or about July 22, 28, 30, and August 4, 10, 12 and 17, 1977. Nearly six weeks before trial, the government supplied the defendants with a Bill of Particulars. That Bill further alleged

the specific shipments to which the telephone communications were purportedly related. With respect to each of the seven occasions on which it was alleged that a load of oil had been stolen, the Bill particularized the date "on or about" which the theft occurred * and which refinery or warehouse it came from. In addition, prior to trial, the government provided the defendants with invoices relating to seven loads of fuel oil which it indicated would be introduced in evidence at trial. The information on these invoices corresponded with the dates, and points of origin reflected in the Bill of Particulars, and also particularized what type of fuel product was involved on each load.

The government's first witness, W. C. Paradee, Jr., testified that the records of Paradee evidenced shortages of 400,000 gallons of petroleum products during the ten months between November of 1976 and August of 1977. Mr. Paradee confirmed that Scott had been employed as a truck driver for Paradee during this period and testified to some facts suggesting that Scott had been involved in a theft of gasoline on August 16 or 17, 1977. He also testified that the shortages stopped when Scott left Paradee in September of 1977.

On direct examination, Scott testified that he diverted to Forte the seven loads reflected by the invoices and that he had a telephone conversation with Ashman prior to each load, in order to arrange for delivery of the diverted oil. He also identified telephone toll records which showed toll calls charged to his number which were made to the New Jersey residences of Ashman and Dickerson.

On cross-examination of Scott, the defense attorneys traced Scott's activities for each of the seven days on which he claimed he had diverted oil to Forte. For each of those seven occasions, the defense introduced documents which

* The Bill of Particulars listed the fourth load as being on or about August 5, whereas the indictment said August 4.

suggested that Scott could not possibly have been diverting to Forte the fuel products which he had specified in his testimony and through his identification of government documents, (GX-2-8), either because he was somewhere else at the crucial time or because he did not pick up that load until sometime after he testified that he had delivered it to Forte. Scott conceded the apparent inconsistency between his testimony and the documentary record, but insisted that the documents were either in error or had been doctored by him. In addition, serious doubt was cast upon other portions of Scott's story during cross-examination. While Scott denied participating in any diversions other than those of Forte, the questioning about his income and assets suggested that his diversion activities had not been limited to the July and August period. Moreover, defense counsel questioned Scott about telephone records which suggested that during July and August, Scott was delivering stolen fuel products to a Dominick Fonte at the National Paving Company in Berlin, New Jersey, which was just down the road from Forte. Scott denied knowing of Fonte or of the National Paving Company, or of having delivered oil there at any time.

Scott's credibility was also challenged by the fact that he had told the grand jury three totally different stories on the three occasions he appeared before it. Finally, Scott conceded that he knew that federal law enforcement agents were after Jock and thought he could benefit himself by giving the government evidence which would help convict Jock.

Following Scott's testimony, the government called Dickerson to the stand. He confirmed Scott's account of how he had introduced Scott to Jock and Ashman in mid-July of 1977. Dickerson also gave testimony which tended to corroborate Scott's testimony regarding several of the

loads. Dickerson was in the midst of cross-examination when Court was recessed on July 13, 1978.

As a result of what the government learned during the cross-examination of Scott, it renewed its investigation. During that investigation, it found that many of the "details" which Scott had provided them with, and to which he had testified, were lies.

In particular, the FBI interviewed Dominick Fonte after the close of Court on Thursday, July 13, 1978, and learned that National Paving Company had, indeed, purchased truck loads of petroleum products from Scott during July and August of 1977 at prices which were slightly less than the below market price Scott had testified he had received from Forte. The government revealed the fact of this interview and its contents to the Court and the defense at an early morning conference on Friday, July 14, 1978. The prosecutor indicated that he was considering recalling Scott to give further testimony, but asked for a continuance until 2:00 P. M. to reevaluate his position in light of the Fonte interview and the information the government would obtain from reinterviewing Scott.

Upon learning of the Fonte interview, counsel for Ashman indicated at that conference that he felt he would need to develop the details of the Fonte story and would need a continuance for that purpose. He indicated that he would want to talk to Dominick Fonte and examine the records of the National Paving Company before resuming his cross-examination of Dickerson. Counsel for Jock indicated that he would apply to reopen his cross-examination of Dickerson and that he would need time for further investigation before resuming that cross. The Court indicated that it would be disposed to grant a continuance to the defense to explore the Fonte story and that the defense could recall Dickerson at any time if the government decided not to drop its case.

The Court met with counsel again at 2:00 P. M. The government announced that Scott was being interviewed at that time and that the government would proceed with the case. It then made a copy of the notes of the Fonte interview available to the defense. When counsel for Jock asked for the National Paving Company records reflecting the purchases from Scott, the prosecutor indicated that they were being mailed to Delaware from New Jersey. Following a strong suggestion from the Court, the plan to mail the National Paving documents was aborted and arrangements were made to have them hand delivered during the day. Defense counsel indicated that they would need to cross-examine Scott as well as Dickerson on the Fonte story and that they would want to reexamine Scott before Dickerson.

Pursuant to an agreement of counsel, the trial continued during Friday afternoon with government witnesses other than Scott or Dickerson. During cross-examination of these witnesses, defense counsel demonstrated that one interpretation of the records of Forte indicated that no petroleum products were delivered to Forte on or about the dates in question.

Scott resumed the stand on Saturday morning, July 15, 1978, and testified until 3:00 P. M. when Court was recessed until Monday morning at 9:30 A. M.

During this second portion of Scott's testimony, he still maintained that on seven occasions during July and August of 1977, he had had telephone communications with Ashman for the purpose of arranging deliveries of stolen fuel products to Forte, and that he actually diverted those seven loads to Forte. However, some of the "details" of those diversions were changed. On four of the allegedly diverted loads, those of July 22, and 30, and August 5 and 17, Scott testified that the invoices which he

had previously identified did not reflect the loads he had diverted to Forte. He was certain of this because they reflected loads of fuel oil and he had delivered only gasoline to Forte. (T. 845, 858, 859, 876, 881). On those four occasions, he testified that he also wasn't sure whether the dates he had testified to previously were correct but that he believed the loads had been delivered around the dates he had identified. Concerning the other three alleged loads, those of July 28, and August 10 and 12, Scott said that he was not sure whether the loads he had previously identified had been the correct ones. (T. 851, 861, 862). In addition, he testified that prior to diverting any fuel products to Forte, he had delivered in the neighborhood of thirty loads to persons other than the defendants. (T. 840). He testified that he had delivered eight or nine loads to Mr. Fonte at National Paving Company during the summer of 1977. He also admitted that several of his other answers given during his initial testimony had been lies.

At the end of Scott's direct testimony, the following colloquy occurred between counsel and the Court:

> MR. KIDD: Your Honor, I am not fully prepared to go forward with the cross-examination in its entirety. Because of the sequestered jury I won't move for a continuance at this time, but I will try to do as much of the cross-examination as possible. But I think in light of the developments of the testimony and the surprise to the defense, and the changes that have been made, that we at least be allowed to bring him back on Monday and give us a day to prepare the cross-examination.
>
> Do you have any problem with that?
>
> MR. COLE: No.

> THE COURT: All right.
>
> MR. KIDD: I just wanted to alert you to that before we start.
>
> THE COURT: I think that's reasonable.

(T. 868).

During the cross-examination of defense counsel on July 15, 1978, Scott acknowledged that he had lied under oath to three grand juries and to the jury he was then addressing, conceding that between recorded FBI interviews, grand jury appearances and Court appearances he had told at least six different versions of the same events. He was examined regarding his sales to National Paving Company and another New Jersey concern and acknowledged that he had made phone calls to Fonte at National Paving Company on some of the dates he had testified he was making deliveries to Forte. Scott was questioned again about the fact that the documents indicate that he had picked loads up at times after the time he had testified he had delivered those loads to Forte. The overall import of his testimony on cross was that he could not explain the documents but that he was positive about the arrangement with Forte and that he believed that he made seven deliveries there on about the dates alleged.

At 3:00 P. M. on July 15th Court was recessed following this further colloquy:

> MR. SEGAL: Your Honor, for the time being I have no further questions.
>
> THE COURT: Will counsel approach the bench?
>
> (The following occurred at side-bar out of the presence of the jury:)
>
> THE COURT: What else is there, Mr. Cole?

MR. COLE: I am not sure what you mean, your Honor.

THE COURT: What else does the Government have in the way of evidence, besides this witness and Mr. Dickerson's cross?

MR. COLE: Nothing, your Honor.

MR. KIDD: Your Honor, at this point we have decided that we don't need Mr. Dickerson, so we are willing to give up our cross-examination of him, though I am concerned, I would prefer to hold him on cross until Monday because if we release him today from cross, it would not surprise me if we came back on Monday and Mr. Dickerson will be in here with another story.

MR. COLE: I represent to the Court that will not happen.

MR. KIDD: All right. If I am guaranteed that there will be no other story from Mr. Dickerson. I am willing to release him from cross.

* * *

MR. KIDD: Then we will release Mr. Dickerson, your Honor. We don't need his testimony at this point or want his cross-examination.

I am assuming this is the Government's case?

MR. COLE: Yes.

MR. KIDD: So the only thing holding it open would be Mr. Scott on Monday?

MR. COLE: Yes.

MR. KIDD: And at this time I can advise the Court we anticipate putting no defense on, so that the only

thing you have facing you on Monday is possibly a couple hours of Mr. Scott, or possibly next to nothing of Mr. Scott. I am not sure until we go over the files and the records.

Does that give you some idea?

THE COURT: Yes, it does.

MR. KIDD: Because I would leave Mr. Scott go, but I am assuming you wouldn't charge until Monday anyway, so I would prefer to hold Mr. Scott and review the records over the weekend.

Is that acceptable to everyone?

MR. COLE: That is acceptable to me.

MR. KIDD: Is that acceptable to the Court?

THE COURT: Yes.

(T. 950-2).

When Court reconvened on Monday morning, defense counsel advised the Court that they had no further cross-examination of Scott. (T. 957). The government then rested its case. Defendant Jock offered no evidence; defendant Ashman offered two character witnesses. The record was then closed.

At that point, both defendants moved for judgments of acquittal on all counts, pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure. The arguments on the motions for judgments of acquittal were made immediately after the record was closed on the morning of July 17, 1978. The primary argument in support of the motions was the insufficiency of the evidence to prove the crimes charged. Counsel added, however, that their clients had been prejudiced by Scott's change in testimony, arguing that if time had been available to reconstruct Scott's activi-

ties for each night on which he had made a gasoline delivery during the period of the indictment, as had previously been done for the seven dates mentioned in the Bill of Particulars, the defense might well have been able to further impeach Scott's newest story.

The Court granted the motions with regard to Counts IX and X, the theft from interstate shipment charges. This was because the government had introduced no evidence that these two alleged loads, those of July 30 and August 5, 1977, were in interstate shipment, an essential element of an offense under 18 U. S. C. § 659, when they were allegedly diverted.* The Court took the remainder of the motions under advisement, pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, and charged the jury.

With regard to the dates of the telephone calls relied upon the wire fraud counts and the overt acts ** in the conspiracy count, the Court instructed the jury:

> You will note that the indictment charges that the telephone calls referred to in Counts II through VIII, and the overt acts referred to in Count I were made or committed on or about certain dates. The proof need not establish with certainty the exact date of the alleged offenses. It is sufficient under the law if the evidence in a case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged. Reasonableness is to be determined with reference to the circumstances of the entire case and the preparation task of the defense in the case. In this case, I instruct you that a finding

* Count IX involved a load which was allegedly diverted while en route from Wilmington, Delaware to Dover, Delaware. Count X involved a load which was allegedly diverted while en route from Delaware City, Delaware to Dover, Delaware.

** The overt acts alleged in the conspiracy count were the telephone calls and the deliveries of the loads.

> of a telephone call or an overt act within one day before or after the date alleged would be a finding of a date reasonably near the date alleged.

Initially, the Court proposed the standard instruction giving the jury discretion to determine what was "reasonably near" the dates alleged. The defendants objected to that instruction. Because the grand jury had charged seven separate crimes within a short period of time, the Court felt that it was appropriate to have a more restrictive instruction on this matter in order to reflect the apparent intent of that grand jury. Accordingly, I instructed that "on or about" the date alleged should be limited to within one day either way of the date alleged.

After deliberating for more than a day, the jury returned the verdicts noted above.

II. The Motions for Judgments of Acquittal.

A. *The Wire Fraud Counts.*

The wire fraud statute, 18 U. S. C. § 1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communications in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

It is clear that in order to obtain a conviction under this statute in this case, the government had to prove two things: (1) the existence of a scheme to defraud, and (2) an interstate telephone communication made for the pur-

pose of executing that scheme. *United States v. Patterson,* 534 F. 2d 1113 (5th Cir. 1976); *United States v. Freeman,* 524 F. 2d 337 (7th Cir. 1975); *United States v. Marino,* 421 F. 2d 640 (2nd Cir. 1970); *Osborne v. United States,* 371 F. 2d 913 (9th Cir.), *cert. denied,* 387 U. S. 946, *reh. denied,* 389 U. S. 891 (1967).

The testimony of Paradee, Scott and Dickerson regarding the alleged diversions to Forte of fuel products paid for by Paradee, and the telephone records of Scott, Jock, Ashman, and Dickerson provide abundant support for the jury's conclusion that a scheme to defraud on the part of the defendants did exist. The defendants do not dispute this. However, they do maintain that there is not sufficient evidence regarding Count III, V or VI in the record from which the jury could conclude beyond a reasonable doubt that there was an interstate telephone communication for the purpose of executing that scheme. Having reviewed the evidence regarding the three counts upon which the jury convicted, I conclude that there was not sufficient evidence upon which the jury could find the defendants guilty beyond a reasonable doubt on Counts III and VI, but that there was sufficient evidence to support the conviction on Count V.

1. Count III.

Count III alleged that on or about July 28, 1977, the defendants transmitted or caused to be transmitted an interstate telephone communication between Delaware and New Jersey for the purpose of executing the alleged scheme to defraud. Only defendant Jock was convicted on Count III. The only reasonable explanation for the jury's split verdict on this Count is that it relied upon a phone call between Scott and Jock in reaching its conclusion. It does not seem to me that there is any plausible explanation

of how the jury could have relied upon a call between Scott and Ashman and still have returned the verdicts it did. Therefore, I believe the appropriate analysis is that of the evidence regarding phone calls between Scott and Jock on or about July 28, 1977.*

The telephone toll call records (GX-17, GX-19) show that on July 28, 1977 at 2:00 A.M., Jock's residence in Newark, Delaware, was called from Gloucester City, New Jersey, and that that call was billed to Scott's home phone. The duration of the call was one minute or less. This is the only call between Scott and Jock regarding Count III about which there is any evidence in the record. Scott testified about this call. He said that he did call Jock from Gloucester City, but that he was unable to reach him. (T. 159, 217, 441-4, 856). Scott also testified that he didn't recall whether anybody answered the phone on that call, (T. 159), although the toll records makes it clear that somebody must have. In addition, Scott testified that he never talked to Jock from July 22 to August 17, 1977. (T. 444). The government has introduced evidence sufficient for the jury to find that the defendants caused an interstate telephone call to be transmitted on July 28, 1977. However, the government also had the burden of proving that the content of that call was in execution of the alleged scheme to defraud. *Osborne v. United States, supra.* The record is devoid of any evidence whatsoever indicating that that communication was in furtherance of the execution of that alleged scheme. In fact, the evidence offered by the government shows that there was no meaningful conversation during this telephone call.

* As far as Scott-Ashman telephone communications are concerned, the toll call records introduced by the government do not show any calls between Scott's residence and Ashman's residence on or about July 28, 1977. Although Scott testified that he called Ashman on July 28, 1977 and left a message for him in his absence, (T. 157, 435), there is no evidence from which a jury could conclude beyond a reasonable doubt that this was an interstate call.

Since there is no evidence that the only relevant telephone call in the record on or about July 28, 1977 "transmitted . . . any . . . sounds for the purpose of executing" the alleged scheme to defraud, Jock's motion for a judgment of acquittal on Count III will be granted.

2. Count V.

Count V alleges that on or about August 4, 1977, the defendants transmitted or caused to be transmitted an interstate telephone communication between Delaware and New Jersey for the purpose of executing the alleged scheme to defraud. The jury convicted both Jock and Ashman on this count.

The telephone toll call records (GX-17, 19) show that on August 4, 1977, there were two calls from Scott's residence in Dover, Delaware to Ashman's residence in Blackwood, New Jersey, one at 2:02 P.M. and the other at 2:04 P.M. Scott testified that he placed those phone calls. (T. 218-9). Scott also testified that those calls related to the delivery of fuel products to Forte. (T. 233).

The evidence introduced is sufficient for the jury to find that on or about August 4, 1977 there were interstate phone calls between Scott and Ashman which were in furtherance of the alleged scheme to defraud. Accordingly, the defendants' motions for judgments of acquittal on Count V will be denied.*

3. Count VI.

Count VI alleges that on or about August 10, 1977, the defendants transmitted or caused to be transmitted an

* At oral argument on July 17, 1978, before the case went to the jury, defense counsel conceded that on Count V, there was sufficient evidence to go to the jury. Jock's attorney said at that time: "There is evidence to go to the jury on the telephone call on 8/4/77."

interstate telephone communication between Delaware and New Jersey for the purpose of executing the alleged scheme to defraud. The jury convicted both Jock and Ashman on this count.

The telephone toll call records introduced by the government do not indicate any interstate calls between Scott and either Jock or Ashman on or about August 10, 1977. Scott did testify that on August 9, 1977, he had telephone conversations with Ashman. (T. 170, 861). However, the government attorney never asked, and there was no testimony regarding, where these calls originated or where they were received. The government contends, nevertheless, that since the record indicates that Scott and Ashman had exchanged home phone numbers, the jury was entitled to infer that the calls were interstate. However, it is also clear that Scott was on the road in New Jersey frequently and that Ashman was in Delaware on occasion. Since there are no toll call records (or any other evidence) indicating that Scott called Ashman from his home in Delaware to Ashman's home in New Jersey, or vice versa,* there is simply no evidence to support a finding of an interstate communication beyond a reasonable doubt.

Accordingly, the defendants' motions for judgments of acquittal on Count VI will be granted.

B. *The RICO Counts.*

The jury convicted both defendants of violating RICO (Count XI) and of conspiring to violate RICO (Count I). 18 U. S. C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign com-

* Indeed, these records demonstrate that there were no such calls from August 8 through August 10th.

> merce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U. S. C. § 1961(5) provides, in part:

> "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Finally, pursuant to 18 U. S. C. § 1961(1), "racketeering activity" includes:

> . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1343 (relating to wire fraud) . . .

Count XI of the indictment in this case charged the defendants with a pattern of racketeering activity composed of the other substantive offenses charged in the indictment. Since judgments of acquittal must be entered on all of those offenses except one, the motions for judgments of acquittal on Count XI must also be granted. It also follows that the motions for judgments of acquittal on Count I, the conspiracy to violate RICO charge, must also be granted. *See United States v. Brown,* No. 77-2082 (3rd Cir. filed August 14, 1978).

III. The Motions for a New Trial.

Since I have concluded that there was sufficient evidence to sustain a conviction on Count V, I must address the defendants' motions for a new trial, insofar as they relate to that count.

As noted above, Count V of the indictment charged the defendants with wire fraud on or about August 4, 1977. In its Bill of Particulars, the government told the defense

that the phone call involved was in furtherance of a scheme to defraud, which included a diversion of oil from Getty Oil Company on or about August 5, 1977. The trial jury was instructed by the Court that in order to convict, it would have to conclude that the phone call was made within one day either way of the date alleged in the indictment. The jury found both of the defendants guilty. And I have held that there was sufficient evidence presented in the record to support this verdict.

The defendants now argue that their convictions on Count V cannot stand, and that they are entitled to a new trial on that Count, because either (1) there was a constructive amendment to the indictment, or (2) there was a prejudicial variance between the facts alleged and the actual proof.

It is clear that there are two types of variances between the facts alleged by the government and the actual proof adduced at trial. *See United States v. Somers,* 496 F. 2d 723 (3rd Cir.), *cert. denied,* 419 U. S. 832 (1974). The first type is "constructive amendment" of the indictment. This type of variance is reversible *per se,* because there has been a modification of the elements of the crime charged by the grand jury. *See United States v. Stirone,* 361 U. S. 212 (1960); *United States v. Crocker,* 568 F. 2d 1049 (3rd Cir. 1977); *United States v. Goldstein,* 502 F. 2d 526 (3rd Cir. 1974). In *Crocker, supra,* at 1059-60, the Third Circuit set forth the test for determining whether there has been a constructive amendment.

> In Stirone v. United States, 361 U. S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), . . . , the Supreme Court recognized that even though a trial court did not formally amend an indictment, it could accomplish the practical result of trying a defendant on a charge for which he was not indicted by a grand jury if it

> permitted proof of facts on an essential element of an offense which were different than those charged in the indictment. . . . The consequence of a constructive amendment is that the admission of the challenged evidence is *per se* reversible error, requiring no analysis of additional prejudice to the defendant.

In this case, I conclude that there has been no constructive amendment of the indictment because the proof of the essential elements of the wire fraud charge did not differ from what the grand jury had alleged.

As discussed above, the essential elements of wire fraud in the context of this case are: (1) the existence of a scheme to defraud, and (2) an interstate telephone call in furtherance of that scheme. The grand jury charged that an interstate telephone call was placed on or about August 4, 1977 in furtherance of the alleged scheme to defraud. There was no variance from this allegation in the proof. Although the proof on how the scheme to defraud was carried out may have differed somewhat from what had been alleged in the Bill of Particulars, there was no evidence offered on the actual existence of the scheme which differed from what the grand jury had charged. Accordingly, there was no constructive amendment of the indictment and the conviction on Count V is not reversible *per se.*[*]

Even though there was no constructive amendment of the indictment, the defendants contend that they are still entitled to a new trial on Count V because they were

[*] There is no reason to believe the grand jury indicted defendants on a different crime that the petit jury found them guilty of. What defendants are arguing in reality is for this Court to speculate on whether the grand jury would have indicted on that charge if it had had the information which subsequently became available to the petit jury in Scott's cross-examination. This would be a novel and impractical rule.

actually prejudiced by the variance which allegedly occurred between the proof and the allegations of the Bill of Particulars. This second type of variance is far different from a constructive amendment of the indictment, in both theory and effect. Such a variance is, of course, not reversible *per se*. It is simply a claim of a violation of due process. The inquiry is into the fairness of the trial, i.e., whether substantial rights of the defendant have been affected. *See Berger v. United States*, 295 U. S. 78 (1935); *Kotteakos v. United States*, 328 U. S. 750 (1946); *United States v. Somers, supra.* Under *Somers*, the court is to examine whether the fairness of the trial was undermined by the variance due to the prejudice to the defendant. As the court there said, the relevant question is:

> Was [the defendant] so surprised by the proof adduced that he was unable to prepare his defense adequately?

496 F. 2d at 746.

The government's theory regarding Count V, as indicated in the Bill of Particulars, was that Scott and Ashman had an interstate telephone communication on or about August 4, 1977, in order to arrange the diversion of a load of fuel product from Getty Oil in Delaware City, Delaware, to Forte on or about August 5, 1977. Pretrial, the government supplied the defendants with the documents which it intended to introduce.

At trial, Scott initially testified that the load from Getty identified in GX-5 was the one he diverted to Forte. (T. 165-6). However, as described above, Scott's story was devastated upon cross-examination. The defense attorneys confronted him with DX-2, his "Driver's Daily Log" for August 5, 1977, in which he himself had indicated that he was on the road during the time he said he was at Forte, that he was in Baltimore, Maryland shortly

thereafter, and that he did not get to Getty until six to eight hours after the time he said he had delivered that load to Forte. The defense pointed out that the time marked on GX-5a itself contradicted his story. It introduced other documents, DX-3 and DX-4, which corroborated the time sequence found on DX-2. Having had his story destroyed, Scott admitted that he had not identified the correct load. (T. 859). He then testified that he thought he had made a delivery to Forte on August 5, but that he could be wrong about the date. (T. 876).

The defendants now contend that (1) Scott's second story varied from the allegations of the government's Bill of Particulars, and (2) that they were prejudiced by that variance. I am not persuaded by the defendants' contentions on either point.

The government had represented that it was going to attempt to prove the diversion of loads of fuel products to Forte, including a load from Getty Oil on or about August 5, 1977. It is true that the defendants had the right to rely upon the government's representation, and in their preparation for trial, to limit the scope of their investigation to that load. However, I do not believe that the government's representation that it would introduce the August 5th invoice in evidence irrevocably bound its case to that invoice or justified any decision on the defense not to investigate the days "on or about" August 5th.

The fact is that while some of the evidence introduced by the government was inconsistent with other evidence introduced by it, it was fairly within the scope of the Bill of Particulars.

Scott never testified that the alleged shipment on or about August 5th was not from Getty Oil. He merely said that he may have been wrong as to the exact date. During cross-examination of Scott, the following exchange took place:

> Q Now, do you recall with regard to the fourth shipment, the one on August 5th, 1977, did you lie about that shipment?
>
> A No, I did not. I could have been wrong about the date, but the shipment was right.

(T. 876). Evidently the jury determined on the basis of this testimony that despite all the inconsistencies in his testimony, Scott made an interstate call to Ashman on August 4, 1977, to arrange a delivery of stolen gasoline on or about August 5th. Except for the fact that the load was gasoline rather than fuel oil, a difference not claimed to be material, the evidence apparently relied upon did not vary from the allegations of the Bill of Particulars.

Even if there was a variation between what was alleged in the Bill of Particulars and what was proven, in order to obtain a new trial, the defendants must make a showing of actual prejudice. Unless they were actually prejudiced, there was no unfairness in the trial of which they can complain. To quote their brief, the defendants' claim of prejudice is that they . . .

> . . . were wholly unprepared to rebut Scott's allegations that the alleged deliveries occurred "somewhere around" the dates alleged. It is submitted that if given the opportunity, the defendants could have been equally successful in disproving Scott's amended allegations.

Defendants' Opening Brief, p. 15.

This "submission" does not in my judgment constitute a showing of actual prejudice. The defendants are asking the Court to assume, seven weeks after trial, that more time spent investigating documentary records readily available to the defense would (1) produce additional evidence

for use in impeaching Scott and (2) that such additional evidence would have materially increased the defense's ability to discredit Scott. This is not a case where the development of the trial makes prejudice to the defense apparent and, in the absence of some record basis, I refuse to make the assumptions which defendants' argument requires.

Finally, there is a even more basic reason for denying the motions for a new trial on Count V. I do not doubt that defense counsel were surprised and felt aggrieved by Scott's change of testimony.° But it is equally clear from the record that defense counsel made a deliberate tactical decision not to ask for a further continuance and to go to the jury on the heels of what can accurately be described as a withering and effective cross-examination. The Court had previously indicated a disposition to grant a continuance in connection with the National Paving Company records and there was no basis for assuming that it would not be open to a continuance to further examine the Paradee records and/or the refiner records.° Such a continuance could by no means assure a stronger cross-examination or impeachment, however, and might dilute the effect of the cross-examination already conducted. Worse yet it might allow time for the government to regroup and find additional records tending to support Scott's new story for redirect. But whatever the specific rationale, it is clear that counsel asked for and received a continuance from Saturday afternoon until Monday morning to review the

° One might add that government counsel obviously experienced the same emotions.

° Counsel knew the kinds of records available and their locations, and nothing suggests to the Court that twenty-four hours in addition to the time in fact afforded would not have been sufficient to determine what additional records might show. It is also clear that the defense had an investigator working with it, but the time required was not determined because no continuance was requested.

records and decide whether it was content with the existing record. Having elected not to seek a further continuance and to forego further cross-examination or defense evidence beyond the two character witnesses, the defendants are not now entitled to a second bite at the apple.

In addition, the defendants claim that GX-19, a summary of all telephone toll calls between Jock, Ashman, Scott and Dickerson for the period from July 28 to August 31, 1977 was improperly admitted into evidence and also improperly permitted to be taken into the jury room during deliberation. I believe that GX-19 was properly admitted pursuant to Federal Rule of Evidence 1006, that its probative value was not "outweighed by the danger of unfair prejudice", Federal Rule of Evidence 403, and that it was properly considered by the jury during its deliberation.

The defendants also renew a continuing motion made under *Brady v. Maryland*, 373 U. S. 83 (1963). However, they have not made the showing of prejudice required in order for that motion to be granted.

For the reasons stated, the defendants' motions for a new trial will be denied.

IV. Conclusion.

Having reviewed the record, I conclude that "the evidence is insufficient to sustain a conviction" on either Count III or Count VI. For the reasons stated, it follows that the convictions on the RICO counts, I and XI, also cannot stand. Accordingly, judgments of acquittal will be granted to defendant Jock on Counts I, III, VI and XI, and to defendant Ashman on Counts I, VI and XI.

However, there is sufficient evidence in the record upon which the convictions on Count V can be sustained. I have also concluded that no meritorious grounds for a new trial have been presented on that Count. The convictions of both defendants on Count V will stand.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 78-11

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK JAMES JOCK and
HARRY ASHMAN,
Defendants.

Order.

THIS 8th day of September, 1978, for the reasons stated in the Court's Opinion of this date,

Now, therefore, IT IS ORDERED that:

1. Defendant Jock's motions for judgments of acquittal on Counts I, III, VI and XI are granted.

2. Defendant Jock's motion for a judgment of acquittal on Count V is denied.

3. Defendant Ashman's motions for judgments of acquittal on Count I, VI and XI are granted.

4. Defendant Ashman's motion for a judgment of acquittal on Count V is denied.

5. Defendants' motions for new trials are denied.

/s/ WALTER K. STAPLETON
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 78-11

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK JAMES JOCK and
HARRY ASHMAN,
Defendants.

James W. Garvin, Jr., Esquire, United States Attorney, William C. Carpenter, Jr., Esquire, Assistant United States Attorney, Wilmington, Delaware; Ronald G. Cole, Esquire, U. S. Department of Justice, Philadelphia Strike Force, Philadelphia, Pennsylvania, Attorneys for Plaintiff

Ronald F. Kidd, Esquire, of Duane, Morris and Heckscher, Philadelphia, Pennsylvania, Attorney for Defendant Jock

Robert I. Segal, Esquire, of Perlstein and Segal, Philadelphia, Pennsylvania, Attorney for Defendant Ashman

Opinion

Wilmington, Delaware
October 6, 1978

STAPLETON, District Judge:

Presently before the Court are the defendants' motions for a new trial and the government's application for a sentencing hearing.

I. The Motion For a New Trial.

Defendants Frank Jock and Harry Ashman have been acquitted on all but one count (Count V) of an eleven count indictment. The background of the case is recited in an earlier Opinion dated September 8, 1978, and will not be repeated here. The defendants' motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, is made on the basis of what they claim to be newly discovered evidence, and on the basis that there was perjured testimony.

Count V alleges that on or about August 4, 1977, the defendants transmitted or caused to be transmitted an interstate telephone communication between Delaware and New Jersey for the purpose of executing a scheme to defraud, in violation of 18 U. S. C. § 1343. After a trial from July 10 to 18, 1978, the jury convicted both defendants on this Count. In my September 8, 1978 Opinion, I held that there was sufficient evidence in the record to support those verdicts.

The evidence upon which the government principally relied in support of Count V was evidence of two interstate calls from Paul Scott's residence in Dover, Delaware to Ashman's residence in Blackwood, New Jersey on August 4, 1977, one at 2:02 P.M. and the other at 2:04 P.M. The defendants now claim that they have newly discovered evidence which proves that Ashman could not possibly have been at his home in Blackwood, New Jersey on August 4, 1977 at the time those calls were received. They have submitted certain documents to the Court in support of this contention, including Ashman's diary entries for August 4, 1977, and his wife's diary entries for that date, documents from Ashman's employer, and a bill of lading and other business records which place Ashman in Brooklyn, New York until at least 1:23 P.M. on that

date. These documents all tend to show that Ashman was not at his home on the afternoon of August 4, 1977.

In determining whether a new trial should be granted on the basis of newly discovered evidence, there are several factors which must be considered. In *United States v. Ianelli,* 528 F. 2d 1290, 1292-3 (3d Cir. 1976), the Court said:

> Generally five requirements must be met before a district court will order a new trial on the ground of newly discovered evidence:
>
> > (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such a nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.
>
> United States v. Howell, 240 F. 2d 149, 159 (3d Cir. 1956). Accord, United States v. Meyers, 484 F. 2d 113 (3d Cir. 1973); United States v. Bertone, 249 F. 2d 156, 160 (3d Cir. 1957); United States v. Nigro, 253 F. 2d 587 (3d Cir. 1958).

As in *Ianelli,* since the defendants have not met the first two requirements, their motion will be denied.*

First, the purportedly newly discovered evidence was in fact not newly discovered, at least with regard to Ashman,** because some of that evidence was in his possession

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* I do not make any findings regarding the remaining three requirements.

** Since, as noted *infra,* the defendants conducted a joint defense, the records in Ashman's possession were also available to Jock before and during trial.

at all relevant times. It is clear from the material submitted by the defendants that all of their new evidence was either (1) in the possession of Ashman or his wife before and during trial, or (2) the fruit of a subsequent investigation stemming from the existence of Ashman's records.

The indictment alleges that certain phone calls were made on or about August 4, 1977. The government provided the defendants with the telephone toll call records it intended to introduce well in advance of trial. At trial, the key government witness, Paul Scott, testified that he had made the phone calls in question to Ashman's residence. At all of these times, Ashman now says he had documents in his possession indicating that he could not have received those calls. Although the defense attorneys have sworn that they had no knowledge of these documents, that does not make them newly discovered.

Second, the Court cannot infer from the record that the defendants were diligent in pursuit of this avenue of inquiry prior to trial. It is clear that the defense of Jock and Ashman was a joint effort on the part of the defense attorneys. In his affidavit, Ashman's attorney stated:

> With regard to the joint efforts between Mr. Kidd [Jock's attorney] and myself, my principal responsibility was to develop defenses that were generated from the phone toll record. . . . Mr. Kidd was primarily responsible for the reconstructing of Mr. Scott's daily activities since there were no telephone calls, involving his client, Jock.

Thus, the effort of Ashman's attorney to develop defenses from the phone call records was on behalf of both defendants. Any lack of due diligence thus applies equally to Jock and Ashman.

Count V alleged a telephone communication on or about August 4, 1977. The defendants knew that the

government was relying upon calls made to Ashman in its prosecution of both defendants and had the relevant toll call records.* Given this situation, there are no facts alleged which can excuse their failure to attempt to reconstruct Ashman's activities of August 4, 1977 prior to or during trial. In his affidavit, Ashman's attorney states:

> I was advised by Mr. Ashman, during the early stages of our preparation that he conversed with Mr. Scott only a few times, and the conversations were during the latter part of August, 1977 and that the conversations would have occurred during the evening hours.

Thus, the defendants knew well before trial that Ashman claimed that he did not have any telephone communications on the date alleged in Count V of the indictment. Yet, they undertook no investigation to attempt to corroborate Ashman's claim.* I am unpersuaded from the facts alleged that there was due diligence on the part of either defendant in not discovering the evidence earlier.

In addition to pursuing a new trial based upon the theory of newly discovered evidence, the defendants also seek a new trial based upon their claim that the documentary evidence shows that Scott perjured himself by testifying that he spoke with Ashman on the telephone on the afternoon of August 4, 1977. In *United States v. Meyers*, 484 F. 2d 113, 116 (3d Cir. 1973), the Third Circuit adopted the "Larrison" test* in dealing with claims of this nature. The Court set out a three part test:

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* Jock was aware that the government was relying upon phone calls between Scott and Ashman in its prosecution of him.

* It is inconceivable to me that after Scott testified as to the August 4 phone calls and Ashman had denied to his attorney receiving any such calls, the defense attorney did not ask his client where he was at that time.

* *See Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928).

1. The court is reasonably well satisfied that the testimony given by a material witness is false;
2. That without it a jury *might* have reached a different conclusion;
3. That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Scott testified that he placed the two calls from his residence in Dover, Delaware to Ashman's residence in Blackwood, New Jersey on the afternoon of August 4, 1977 and that these calls were "with regard to the delivery of either fuel oil or gasoline to Forte Oil on 8/5" (T. 233)—i.e. with regard to the illegal scheme charged in Count V.** If this testimony had been shown to have been perjured, the jury might have reached a different result since the 2:02 and 2:04 P.M. calls were the only calls between Scott's residence and Ashman's residence on or about August 4 which were proven to have been interstate. Even this is not certain,* but I conclude that the second prong of the three prong Larrison test has been met.

** I have reviewed the transcript and have found no occasion upon which Scott testified that he talked to Ashman himself on the afternoon of August 4.

* The defense established conclusively that Scott had repeatedly perjured himself both before the trial and at the trial. Nevertheless it is apparent that the jury remained convinced that Scott, Ashman, Jock and Randolph Dickerson were involved in a scheme to steal petroleum products and that there were numerous phone calls among them concerning this common interest. If the defense had directly attacked the calls on August 4 evidenced by the tolls records as not being connected with the scheme, it is possible that the government would have more fully developed testimony about calls by Scott to Ashman during the evening of August 4th, with questions about their points of origin and receipt.

The defendants have failed to satisfy the first and third requirements, however. The documents do not satisfy me that the 2:02 and 2:04 P. M. calls were not placed by Scott or that they did not relate to the scheme which the jury found to exist. Accordingly, I am not satisfied that Scott perjured himself during his testimony about these calls.

Finally, it seems apparent that this portion of Scott's testimony came as no surprise to the defense, that Ashman knew at trial whether or not he had personally received such a call, or at least that he had the same resources available to check on the matter which he now has, and that there was ample opportunity for the defense to meet this testimony. The indictment alleged a telephone call on or about August 4, 1977. The government gave the defendants toll call records showing the calls from Scott's residence to Ashman's residence on August 4, 1977 well in advance of trial. Thus, when Scott testified regarding those calls, that the defendants could not have been taken by surprise. Even if they were surprised, however, I am unpersuaded that they were unable to meet the testimony or were unaware of its purported falsity at the time of trial. As noted above, at the time Scott testified regarding the August 4, 1977 phone calls, Ashman and the defense lawyers were well aware of Ashman's claim that he did not have any telephone communications with Scott on that date.* Despite this knowledge, the defendants chose not to put on any evidence concerning Ashman's whereabouts during the afternoon of August 4, 1977. Having made that decision, the defendants are not now entitled to a new trial.

Accordingly, the defendants' motion for a new trial will be denied.

* Although the defendants did not have all the records now in their possession, they did have some of them. In addition, there is no reason why the others were not readily available at the time of trial.

II. The Application for a Sentencing Hearing.

The government has requested that the Court hold a sentencing hearing at which it proposes to introduce four categories of evidence regarding defendant Jock. It desires to introduce evidence (1) of phone calls from Jock's telephone to the Tyrone-DeNittis Agency, an alleged loan sharking operation in Philadelphia, (2) that business associates of Jock have frequented the Tyrone-DeNittis Agency, and that a vehicle rented by a company in which Jock has a proprietary interest has been seen parked in front of the Agency, (3) concerning alleged drug transactions between Jock and Robert Graham, now deceased, and (4) that checks have been drawn on the account of a company in which Jock has a proprietary interest to one Michael Grasso, an alleged organized crime figure.

Section 3577 of Title 18 of the United States Code provides:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

In *Williams v. New York*, 337 U. S. 241 (1949), the Supreme Court held that the sentencing judge may consider information regarding the defendant's background and character, including other criminal activity of the defendant. *See also, United States v. Metz*, 470 F. 2d 1140 (3d Cir. 1972); *United States v. Fatico*, No. 78-1003 (2d Cir. filed June 12, 1978). Based upon this case law, I conclude that evidence of the background, character and conduct of a defendant is an appropriate subject for a sentencing hearing, provided that the evidence offered has some guarantee of reliability.

A sentencing hearing will be held on October 17, 1978 at 9:30 A. M. at which the government may tender its evidence. This does not mean, however, that all tendered evidence will necessarily be heard. Judgments will have to be made not only with respect to whether there are sufficient guarantees of reliability but also as to whether the time necessary to hear direct and cross in a particular area is justified by the possible value of the information. I find it difficult to imagine, for example, that I will find information about the associations of associates of Mr. Jock to be helpful in determining what a fair sentence would be, and if testimony in this area will be time consuming, it may be excluded.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 78-11

UNITED STATES OF AMERICA,
Plaintiff,

v.

FRANK JAMES JOCK and HARRY ASHMAN,
Defendants.

Order.

THIS 6th day of October, 1978, for the reasons stated in the Court's Opinion of this date,

Now, therefore, IT IS ORDERED that:

1. The defendants' motion for a new trial is denied.

2. A sentencing hearing regarding defendant Jock will be held on October 17, 1978, commencing at 9:30 A. M.

/s/ WALTER K. STAPLETON,
United States District Judge

COURT OF APPEALS JUDGMENT ORDER.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 78-2530
78-2558

UNITED STATES OF AMERICA
Appellee

v.

HARRY ASHMAN,
Appellant in No. 78-2530

FRANK JAMES JOCK,
Appellant in No. 78-2558

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
(D. C. Crim. No. 78-11)

Argued June 8, 1979
Before: HUNTER, WEIS and GARTH, *Circuit Judges.*

Judgment Order.

After considering the contentions raised by appellants, to-wit:

(1) the trial court erred in holding there was no constructive amendment of the indictment;

(2) the variance between the indictment and proof adduced at trial unduly prejudiced the defendants;

(3) the evidence produced at trial was insufficient to establish the requisite elements of wire fraud under 18 U. S. C. § 1343;

(4) the trial court erred in refusing to grant a new trial or vacate judgment on the grounds of newly discovered evidence;

(5) the trial court erred in holding defendants did not meet the requirements necessary to order a new trial on the basis of the perjured testimony of the government's principal witness at trial; and

(6) summaries of telephone toll call records should not have been admitted into evidence or sent in with the jury during its deliberations,

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

/s/ WEIS
Circuit Judge

Attest:

/s/ THOMAS F. QUINN
Thomas F. Quinn, *Clerk*

DATED: June 14, 1979

COURT OF APPEALS ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 78-2530
78-2558

UNITED STATES OF AMERICA

v.

HARRY ASHMAN,
Appellant in No. 78-2530

AND

FRANK JAMES JOCK,
Appellant in No. 78-2558

Sur Petition for Rehearing.

Present: HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of the court and no judge who concurred in the decision having asked for rehearing, it is

ORDERED that the petition for panel rehearing is denied.

By THE COURT,

/s/ JOSEPH F. WEIS, JR.
Circuit Judge

DATED: August 8, 1979

PORTIONS OF GRAND JURY TESTIMONY OF PAUL SCOTT DATED MARCH 9, 1978.

[28]

A. No.

Q. Now, I direct your attention to August 5, 1977 and show you what has been marked Grand Jury Exhibit-4 of this date and ask you to examine these documents and state whether you recognize the documents. Do you recognize the documents?

A. Yes, I do.

Q. Would you describe them please?

A. The top document is the Bill of Lading from, I'm not sure where this is from, oh, yes, this is from Sun Oil Company in Pennsylvania.

Q. You picked that up in Pennsylvania?

A. Yes.

Q. Where in Pennsylvania?

A. Twin Oaks, Pennsylvania.

Q. How many gallons did you pick up there?

A. 8,000 gallons.

Q. And the bottom documents?

A. The bottom document is the purchase order from Paradee.

Q. Authorizing you to pick up the 8,000 gallons?

A. Yes.

Q. What is it about these documents that lead you to believe that they reflect the load of oil that you stole

[29]

from Paradee?

A. Well, I put on here, "Deliver to Dover, new plant", and at that particular time we only delivered to Dover, new plant only if we had fuel left over.

Q. Preceding the fourth load, which occurred August 5, 1977, were there telephone calls between Whitey Ashman in New Jersey and you in Delaware in which the oil, delivery of oil, was discussed?

A. Yes.

Q. And, of course, during that conversation you discussed delivering the oil to Forte Oil and this represented the oil you were going to take from Paradee and deliver to Forte Oil?

A. Yes.

Q. May I see that document that you have there?

A. Yes.

Q. Let me direct your attention to the top portion of the Bill of Lading which reflects it was delivered from, I believe, Delaware City, BP Oil Corporation. See if that refreshes your recollection about where you picked that up from.

A. Yes. You're right. You're right.

Q. And where is that located?

A. That would be Getty Oil Company in Delaware.

[30]

Q. Where, in Delaware City, Delaware?

A. Yes.

Q. So, that load you did not pick up from Twin Oaks, Pennsylvania?

A. No. See, we picked up at Sun Oil Company under BP. I just looked at BP. I didn't see the top of it. But this would come out of Delaware City.

Mr. Carpenter: And that is Grand Jury Exhibit what number?

Mr. Scott: Four.

By Mr. Cole:

Q. So, you were mistaken about picking that up from Twin Oaks?

A. Yes.

Q. You picked up 8,000 gallons from Getty Oil in Delaware City and as per your telephone conversation with Whitey you drove to Berlin, New Jersey, Forte Oil Company?

A. Yes.

Q. Now, on this occasion was Dickerson with you?

A. He might have been. I'm not sure just what the occasions were.

Q. Of the seven transactions, Dickerson was present on three, is that correct?

A. That is correct.

MOTOR CARRIER BILL OF LADING
SHIPPING ORDER
RECEIVED, SUBJECT TO TARIFFS AND OR CONTRACT IN EFFECT ON DATE OF ISSUANCE

1677?

C.O.D. SHIPMENT

CHARGES TO BE: PREPAID OR COLLECT

TANK NO.	PRODUCT	TEMP.	CLOSING GAUGE FT	IN	GALLONS	OPENING GAUGE FT	IN	GALLONS	MEASURED GALLONS	GALLONS

GETTY PRODUCTS		SUB	T C	GALLONS	PRICE	AMOUNT
GETTY KEROSENE COMBUSTIBLE LIQUID						
GETTY FUEL OIL #2 COMBUSTIBLE LIQUID				8000		

STATE SALES TAX

TOTAL

LOAD CHECKED BY

LOAD NUMBER — METER READINGS

8000 F.O. - Dover New Plant

158 FU3 5 2 2 2 9

157 FU3 5 1 4 2 2 9

PRODUCT #2 Fuel Oil

Getty Refining and Marketing Company - SHIPPER

GOODS RECEIVED ARE CERTIFIED TO BE WITHIN LEGAL WEIGHT LIMITS

YOUR INVOICE PLEASE RETAIN-PRICES AND EXTENSIONS SUBJECT TO CORRECTION

No. 20671

PARADEE OIL CO.

MAIN OFFICE

734-7433 DRAWER A DOVER, DELAWARE

BRANCH MIDDLETOWN, DEL. 653-6180
LEWES, DEL. 645-9050

BRANCH LINCOLN, DEL. 422-5451
LAUREL, DEL. 875-5974

BRANCH CHESTERTOWN, MD.
PLANT 1 778-0002
PLANT 2 778-0770

8/27/77
S.C.

DATE 8/5/77

BRANCH

TO Paradee Oil Co
Harvey Lbl

ADDRESS

DELIVERED TO Dover New plant

WAREHOUSE ORDER NO. 16772

SALESMAN

F.O.B.

VIA

TERMS

PREPAID ☐ COLLECT ☐

NOT SOLD FOR ILLUMINATING PURPOSES IN HOUSES.

SETTLEMENT		
CHG TICKETS		
COUPONS		
CHECKS		
CASH		
TOTAL		

PACKAGES KIND	PRODUCT	PRODUCT CODE	C C	PRICE	FED. TAX	STATE TAX	LOCAL TAX		NET PRICE	QUANTITY	AMOUNT	
	REGULAR GASOLINE											
	PREMIUM GASOLINE											
	KEROSENE											
✓	FUEL OIL NO.									8000		
										SALES TAX		
										TOTAL		

PRINT	TRUCK NO	SALESMAN NO	CIRCUIT PT	CLASS OF TRADE	CUSTOMER			
15								

RECEIVED AND CHECKED

DATE

BY

RECEIVED PAYMENT

DATE

BY